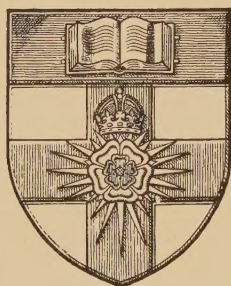


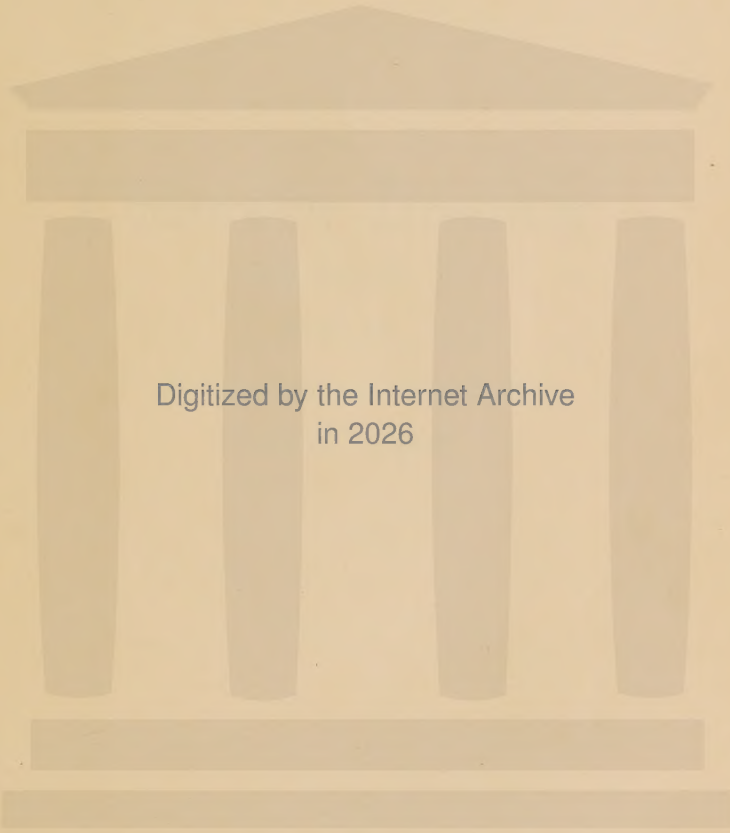
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<i>Legal Aid (General) (Amendment No. 1) Regulations</i> , 1954 (<i>S.I.</i> 1954, No. 166) Harman J. 405	<i>R.S.C., Ord. 14A</i> - - - Upjohn J. 125 — <i>Ord. 55, r. 5A</i> - - - Harman J. 317 — <i>Ord. 65, r. 27 (29)</i> Danckwerts J. and C.A. 455

CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL

In re PELLY'S WILL TRUSTS. RANSOME *v.* PELLY.

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[1955 P. 1344.]

1956
April 25,
26, 27.

Settled Land—Improvement—From capital money—Application of capital money for authorized improvement—Whether tenant for life entitled to benefit of income tax allowance for improvement—Settled Land Act, 1925 (15 & 16 Geo. 5, c. 18), ss. 73, 107.

Lord Evershed
M.R.,
Jenkins and
Hodson L.JJ.

The tenant for life of an estate under a will, in the course of occupying and farming it, carried out improvements falling within section 73 (1) (iv) of the Settled Land Act, 1925, and pursuant to the powers conferred on him by section 75 (2) of that Act he directed the trustees to refund to him out of the capital moneys of the settlement the cost which he had incurred. On a summons taken out by the trustees of the settlement, the tenant for life was ordered to pay to the trustees or to be accountable to them for allowances made to him under the Income Tax Acts which were attributable to the sums which the trustees had paid to him out of the capital moneys. On appeal:—

Held, that the tenant for life was entitled to retain tax reliefs which he recovered, for he was by the terms of the settlement entitled to the whole income of the settled property. The liability to income tax attaching to his beneficial interest was personal to him and so was the benefit of any reduction in tax which he could properly secure. He had not received anything more than he was entitled to receive in right of his beneficial interest, or secured by way of exemption from tax anything more than he ought to have secured on the income properly belonging to

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him, nor had he benefited himself at the expense of the remaindermen. He could not, therefore, be held to be accountable as on a breach of trust.

In re Pettit [1922] 2 Ch. 765; 38 T.L.R. 787 distinguished.

Decision of Wynn-Parry J. [1956] Ch. 81; [1955] 3 All E.R. 483 reversed.

APPEAL from Wynn-Parry J.¹

Frederick Raymond Pelly (hereafter called "the testator"), by his will dated February 22, 1940, and codicil thereto dated October 4, 1940, settled certain freehold property known as the Preshaw Estate on the following trusts: "Upon trust for Major "Harold Alwyne Pelly," that is, the first defendant, now Sir Harold Alwyne Pelly, who was described as being the only son of his father, "during his life without impeachment of "waste with remainder from and after his decease to the use "that the several persons who are or shall be in the line of the "heirs male of the body of the said Sir Harold Pelly baronet "may take successively the following estates and in the following order and manner that is that each of such several persons "born previously to the date of my death shall take an estate "for his life without impeachment of waste with remainder "immediately after his death to the use of his first and other "sons not being persons who would also take estates for life "successively according to seniority in tail male and so that "each of the several persons shall take their estate successively "in the order in which as heirs male of the body of the said "Sir Harold Pelly baronet they would succeed to the Pelly "baronetcy with remainder to the use of myself and my heirs." In the events which had happened the second defendant was tenant for life in remainder expectant on the death of the first defendant (hereafter called "the tenant for life"), and there was at the material time no one in being who was beneficially interested in the corpus of the estate.

The testator died on October 16, 1940. Since that date the tenant for life had been in occupation of Preshaw House and had farmed the land comprised in the Preshaw Estate. In the course of such occupation and farming he had carried out improvements which fell within section 73 (1) (iv) of the Settled Land Act, 1925.²

¹ [1956] 1 Ch. 81; sub nom. *In re Pelly, decd., Pelly v. Ransome* [1955] 3 All E.R. 483.

² Settled Land Act, 1925, s. 73: "(1) Capital money arising under

"this Act, subject to payment of "claims properly payable thereout "and to the application thereof for "any special authorized object for "which the capital money was raised,

The trustees of the settlement took out a summons for the determination, *inter alia*, of the question whether on the true construction of the Settled Land Act, 1925, and in particular sections 73 and 75,² the trustees, in applying capital money in payment for improvements authorized by the Act, were, on the assumption that the capital money so applied did not fall to be regarded for the purposes of the Income Tax Acts either as income of the tenant for life or as a receipt of the trade of farming carried on by him, entitled to deduct and retain out of the capital money so applied, money representing the whole or any part, and if so what part of the relief from income tax recovered or recoverable by the tenant for life by virtue of sections 101, 313 and 314 of the Income Tax Act, 1952, in respect of the expenditure incurred or to be incurred by him. As the tenant for life had already been reimbursed the cost of the improvements which he had carried out, Wynn-Parry J., in deciding the question in the affirmative sense, ordered that the tenant for life was accountable to the trustees for the tax relief recovered or recoverable by him from time to time which was referable to the sums paid to him out of capital moneys for the improvements in question. The judge further ordered that the tenant for life ought at the request of the trustees to make the necessary claims for the relief in question.

The tenant for life appealed. On the hearing of the appeal the second defendant, the tenant for life in remainder, adopted the argument of the tenant for life—having supported the argument of the trustees before Wynn-Parry J.

Charles Russell Q.C., D. H. McMullen and H. B. Magnus for the first defendant, the tenant for life. The tenant for life is a

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"shall, when received, be invested or
"otherwise applied wholly in one, or
"partly in one and partly in another
"or others, of the following modes
"(namely):— . . . (iii) In payment
"for any improvement authorized by
"this Act; (iv) In payment as
"for an improvement authorized by
"this Act of any money expended and
"costs incurred by a landlord under
"or in pursuance of the Agricultural
"Holdings Act, 1923, or any similar
"previous enactment, or under custom
"or agreement or otherwise, in or
"about the execution of any improve-
"ment comprised in Part I or Part
"II of the 1st Schedule to the said

"Agricultural Holdings Act. . . ."

S. 75: "(2) The investment or
"other application by the trustees
"shall be made according to the
"direction of the tenant for life, and
"in default thereof according to the
"discretion of the trustees. . . ."

S. 107: "(1) A tenant for life . . .
"shall, in exercising any power
"under this Act, have regard to the
"interests of all parties entitled
"under the settlement, and shall, in
"relation to the exercise thereof by
"him, be deemed to be in the posi-
"tion and to have the duties and
"liabilities of a trustee for those
"parties."

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trustee of his statutory powers but, by the terms of the settlement, he is entitled to the whole of the income of the settled property, and the proportion which he has to hand over to the fiscus is no concern of those entitled to the capital of the fund. This case is distinguishable from the *In re Pettit*³ type of case, which turned on the question of how much of the estate was given to the annuitant by the terms of the will. Where, because of the difficulty of calculating in advance the exact amount of tax benefit, there has to be paid to an annuitant in the first place a sum in excess of that which it is intended by the terms of the will that he or she should retain, *In re Pettit*³ decides that the annuitant is accountable for the appropriate proportion of his tax relief. In such circumstances it is clear that the annuitant is under an obligation to make the necessary claim for relief: *In re Kingcombe*.⁴ In *In re Batley* (No. 2),⁵ however, the court refused to extend that principle to a gift of an aliquot share of residue, and the decision in *In re Pettit*⁶ has nothing to do with the making of a profit.

This is not a case where the trustee has made a personal profit out of the trust; the tenant for life is merely seeking to retain a benefit to which he is entitled under the terms of the trust by virtue of the general tax law combined with the Settled Land Act, 1925. The liability to tax and the right to reliefs are personal to the individual taxpayer and the amount of the benefit will fluctuate according to his personal taxation position.

If the tenant for life is required to pay over his reliefs to capital, the remainderman will be getting part of the income of the settled property, which he is not entitled to unless it is expressly so provided by the terms of the settlement. It can make no difference that the course which enables the tenant for life to retain more of the income is procured by the tenant for life himself. *In re Sutherland Settlement Trusts*⁷ is not in point, for it is conceded that the expenditure here was properly made out of capital moneys.

[LORD EVERSHERD M.R. The taxpayer is entitled to relief on the cost incurred by him, but here the tenant for life has been reimbursed his expenditure.]

³ [1922] 2 Ch. 765; 38 T.L.R. 787.

⁶ [1922] 2 Ch. 765.

⁴ [1936] Ch. 566; 52 T.L.R. 268;
[1936] 1 All E.R. 173.

⁷ [1953] Ch. 792; [1953] 2 All
E.R. 27.

⁵ [1952] Ch. 781; [1952] 2 All
E.R. 562.

The tenant for life paid for the work and is entitled to benefit, notwithstanding that he is recouped out of capital. See the cross-reference to the Income Tax Act, 1952, s. 332; Simon's Income Tax, Vol. II, p. 362.

The particular claim is under Schedule A, but the case raises the general question whether, where a tenant for life is refunded out of capital expenditure by him, and as the result of that expenditure, under one section or another of the relevant tax Acts, he will ultimately pay less tax than he would otherwise have had to pay, he is accountable for that benefit on the ground that it is a profit produced by the exercise of his fiduciary powers. Benefits attributable to improvements which are revenue trading expenses under Schedule D will be made before arriving at the trading profits and, similarly, for surtax purposes, the allowances would have to be made before assessment. The principle must, however, be the same in all cases, although in some the taxation benefit may be more purely personal to the tenant for life and less directly associated with the particular outlay than in others.

[HODSON L.J. The question, going beyond the tax position, is whether the tenant for life is entitled to increase his expendable income.]

A tenant for life domiciled in Northern Ireland may be able to direct changes of investments which reduce his tax liability, and in such circumstances he gets a benefit which comes in fact from the fiscal legislation, but, assuming that the direction to change does not involve any breach of his fiduciary duties, he is entitled to keep that benefit.

[LORD EVERSHERD M.R. If the settled property is low income-bearing, a direction to reinvest in income-bearing securities might, if the principle of accountability is right, mean that the tenant for life became accountable for most of the income. The fiduciary duty of the tenant for life may be limited to seeing that the interests of the remaindermen are not injured in any way.]

That consideration is relevant in deciding whether the tenant for life is entitled to direct recoupment. If he directs recoupment improperly he will be liable to make good the loss to capital but he would be entitled to his tax benefits. Only where the tenant for life gets a money repayment does it appear superficially that he has made a profit, but he will have received a benefit just as much in those cases where he pays less tax because of benefits allowed before assessment.

It is wrong to say that the tax benefit is produced by the exercise of the fiduciary powers of the tenant for life. The fiscal

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benefit is conferred by doing the work and paying for it; the tenant for life may, or he may not, require the trustees to apply capital moneys to reimburse him. The direction to repay him is an exercise of his fiduciary powers conferred by section 75 but it does not give rise to the tax benefit, nor has the tenant for life made a profit by exercising his powers.

[LORD EVERSHERD M.R. In practice the money may be expended by the tenant for life in anticipation of the exercise of his fiduciary powers to direct repayment and he may discuss with the trustees the prospect of repayment before the work is started.]

That would not affect the validity of the proposition that the carrying out of the work is not something done by the tenant for life as a trustee. The refunding of the expenditure from capital does not produce any tax benefit. If a profit accrues without the exercise of the fiduciary powers, then that cannot be a profit made as a trustee. It would be curious if the result depended on how far the mind of the trustee had gone before incurring the expenditure. The trustees may, of course, refuse to reimburse the tenant for life, but his right to the tax benefit resulting from the expenditure would not be affected by a decision of the court as to his right to reimbursement.

Raymond Jennings Q.C. intervening. The order made in the court below was not confined to refunding. Section 73 empowers the trustees to apply the capital moneys direct or to refund to the tenant for life the expenditure which he has already incurred.]

It is unlikely that the money would ever be paid direct, having regard to the language of section 101 of the Income Tax Act, 1952, but the result would surely have to be the same in either event. If the decision in the court below is correct, it would apply where capital expenditure is required to be repaid by instalments over a period, though the tax benefit may be quantified well within that period. If the tenant for life dies within the period, he will not have received all the instalments, but presumably he would have had to account for the whole of the tax benefit made to him. The decision overlooks the point that the proper exercise of the fiduciary powers of the tenant for life must often—and does here—result in a benefit to him which cannot be within the general principle prohibiting a trustee from retaining a profit made out of the trust, a principle founded on cases such as *Keech v. Sandford*.⁸ If the principle can be applied here, the trustees could sue the tenant for life,

⁸ (1726) Sel.Cas.Ch. 61; White & Tudor's Leading Cas., 9th ed., vol. 2, p. 648.

but the pleadings would be an entirely novel extension of the *Keech v. Sandford*⁸ principle. Such an application would be contrary to and stultify the policy of the legislature, which was to permit and to encourage capital expenditure in agriculture. The tenant for life would get for his expenditure a not very immediate and tangible benefit; he would lose directly the income from the investments sold to pay for the improvements, and he would not have the incentive of having improved his tax position.

It is generally said that a trustee may not put himself into a position in which his duty and his interest are in conflict, and if he does and makes a profit, then he must account for the profit. But in the present case the benefit is the inevitable result of the powers conferred by the Settled Land Act, the settlement and the general tax law, and there is no room for any equitable obligation to account. With regard to the analogous right of directors to retain fees, see *In re Llewellyn's Will Trusts*,⁹ which was followed in *In re Macadam*¹⁰ and *Williams v. Barton*.¹¹ The present case is stronger than *In re Llewellyn's Will Trusts*.¹² The settlement expressly authorizes the tenant for life to do something as a trustee and it is known that, by the general law, that will result in a benefit in the fiscal sense. The true inference is that the settlor was accepting that fact.

A. W. Franklin for the second defendant, tenant for life in remainder, supported the argument for the tenant for life.

Raymond Jennings Q.C. and *Denys Buckley* for the plaintiffs, trustees of the settlement. The question at issue can be best understood by an example. If a tenant for life with a gross income of £6,000 from the settled property and liability for tax at 10s. in the £1, spends nothing on improvements, he will be liable for £3,000 tax. But if he spends £6,000 on repairs and improvements he suffers no tax, assuming that he is entitled to allowances equal to the income and ignoring the averaging of the allowances. Then, if he calls on the trustees to reimburse the expenditure of £6,000, he will have that sum in his pocket. That is a moderate example, for the tenant for life is only assumed to be liable for tax at 10s. in the £1. If he is liable for surtax at the highest rate, the differentiation would not be between £3,000 and £6,000, but between £400 to £500 and £6,000. Under the

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⁸ (1726) Sel.Cas.Ch. 61.¹⁰ [1946] Ch. 73; 62 T.L.R. 48;⁹ [1949] Ch. 225; [1949] 1 All E.R. 487.

[1945] 2 All E.R. 664.

¹¹ [1927] 2 Ch. 9; 43 T.L.R. 446.¹² [1949] Ch. 225.

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Settled Land Act, until 1948 the improvements which could be paid for out of capital were all of a capital nature, but by virtue of the Agricultural Holdings Act, 1948, certain repairs were included: see *In re Duke of Northumberland, decd.*,¹³ and *In re Sutherland Settlement Trusts*.¹⁴ It is one thing to say that the tenant for life should be indemnified for the cost of these repairs but quite another thing to say that he should be able in addition to put a considerable sum into his pocket as spendable income. In effect he would be depleting the capital of the settled land.

[LORD EVERSHERD M.R. But the tenant for life is in possession just as an absolute owner is. If the absolute owner used his capital to improve the land he would get the tax relief. The Settled Land Act tenant is in the same position, but in his case Parliament has said that he can use the settlement capital. Therefore, having done so, assuming that the taxing Acts do not disqualify him from receiving the allowance because the money was in truth found by someone else, he is entitled to the allowance just as the absolute owner would be.]

The reason why the trustees should be able to call on the tenant for life to account for the proceeds of unjust enrichment is that the tenant for life is a trustee of his powers and a trustee must not make a profit out of his trust. A tenant for life does not, of course, have to account for every profit which he makes. In many cases the exercise of Settled Land Act powers will result in some advantage to a tenant for life which he can keep, but the test is whether it is within the intendment of the settlement, or the Settled Land Act as read into the settlement, that he may keep the benefit, for he can only take that which the will or settlement under which he makes title gives him: *In re Biss*.¹⁵

[LORD EVERSHERD M.R. If a tenant for life called on the trustees to invest in premium bonds, would he be accountable for a prize?]

It would depend on whether a prize was to be regarded as an income benefit or not.

If the tenant for life directs the trustees under section 75 to reimburse him out of capital pursuant to section 73, he is exercising trust powers. At that moment his duty as a trustee comes into conflict with his interest as a beneficiary. His interest is to get the maintenance claim and to increase his spendable income, but his duty is to see that only those improvements are paid for out of capital which will benefit

¹³ [1951] Ch. 202; 66 T.L.R. (Pt. 2) 1045; [1950] 2 All E.R. 1181.

¹⁴ [1953] Ch. 792.

¹⁵ [1903] 2 Ch. 40, 56.

the inheritance. If he makes improvements to the land he is entitled to the reliefs from tax, but if he is reimbursed he is getting an advantage for himself over and above the intendment of the trust. A profit arising from a change of investment within the authorized range is in an entirely different category and may be retained by the tenant for life. The *Keech v. Sandford*¹⁶ principle that a trustee may not make a profit, except to the extent that the profit is contemplated by the trust, is a basic principle of equity. It is a matter of public policy (*Griffin v. Griffin*¹⁷) to see that a trustee is not put into a position where his duty as a trustee and as a beneficiary conflict: *Williams v. Barton*.¹⁸ The intendment here is that the tenant for life is not to suffer by having his income depleted; he is to be indemnified and he is to have the benefit of the improvement, but it is not intended that he should get any advantage in the amount of his spendable income. The real purpose of the power is to give assistance to tenants in carrying out necessary capital improvements.

[LORD EVERSHERD M.R. The intendment would be that the tenant for life should have the beneficial enjoyment of the estate, which would involve that in that capacity he would have to pay income tax, and if as a result of what he does he has to pay less income tax it is difficult to see why that should not be within the intendment. If he is accountable it means in substance that he has to return to the trustees part of what he receives, on the ground that it is not intended that he should retain the whole income of the settlement.]

It may be that the tenant for life does have to make a payment back of part of what he receives. The question of what is the "income of the settlement" is not in issue here, but, if the position is analysed, what in substance is repaid is part of the capital, not the income. This is a profit which the tenant for life has obtained by using capital money. The settlement does not expressly say that the tenant for life is to have the whole income and is not accountable for any profit, for example, of reinvestment.

[JENKINS L.J. If, as a result of improvements, the tax liability of the tenant for life was increased, would he be entitled to be indemnified for that increase?]

He would not, for he has the advantage of the improvements.

The *Keech v. Sandford*¹⁹ principle has been extended to every type of case where a person in a fiduciary position gets a profit:

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¹⁶ Sel.Cas.Ch. 61.¹⁷ (1804) 1 Sch. & Lef. 352.¹⁸ [1927] 2 Ch. 9.¹⁹ Sel.Cas.Ch. 61.

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see *In re Macadam* ²⁰ and *In re Llewellyn's Will Trusts*.²¹ The argument that the issue is between the taxpayer and the Inland Revenue and has nothing to do with the trust was unsuccessfully put forward in *In re Pettit*.²²

[LORD EVERSHERD M.R. What made the argument difficult to sustain in that case was the express reference to the tax position in the gift itself.]

It was persisted in in *In re Lyons*.²³ If the tenant for life is accountable for the profit he makes it should be brought in when the benefit is received. If it is received over a number of years, it must be accounted for over that period. It is no answer to say that the particular tenant for life who did the improvement has died during the period. Difficulties of accounting can be dealt with when they arise.

Denys Buckley following. Section 73, in so far as it relates to directions to apply capital, is limited to indemnifying the tenant for life for expenditure. The tenant for life qualifies for relief from his personal liability to tax, but it does not follow that he is entitled then to get from capital not only the net cost of the improvement but also something spendable for his own purposes. If that were to be the result of the exercise of his section 75 powers he would be put into a position where his duty and his interest are in conflict, and, as Lord Herschell said in *Williams v. Barton*,²⁴ it is an inflexible rule of equity that he should not be put into such a position. In the absence of clear language it would be wrong to construe the section so as to produce such a result.

Charles Russell Q.C. in reply. The argument that section 73 is, on its true construction, limited to indemnifying the tenant for life is inconsistent with the argument that the power is unlimited but that, if the exercise of the power results in a profit to the trustee, then he is accountable. The argument that the statutory power ought to be construed narrowly because to do otherwise might put the tenant for life in an embarrassing position is fallacious. A tenant for life is frequently in a position where his duty and his interest are in conflict. For example, he will have from time to time to direct the investment of capital moneys. His personal interest will be to get as much interest as possible, but as a trustee his main interest is not in income but the retention or enhancement of the capital value. Subject to the

²⁰ [1946] Ch. 73.

²¹ [1949] Ch. 225.

²² [1922] 2 Ch. 765, 767.

²³ [1952] Ch. 129, 131; [1951] 2 T.L.R. 1256; [1952] 1 All E.R. 34.

²⁴ [1927] 2 Ch. 9.

intervention of the court he has to decide on the proper course. If the tenant for life is reimbursed after he has paid for the work which entitles him to relief, it cannot be said that the benefit results from the exercise of his fiduciary power. Reimbursement after the cost has been incurred is the more normal course of events, and it may perhaps be doubtful whether a tenant for life would qualify for relief if payment is made direct to the contractor doing the work. If he does qualify this particular argument would not be relevant in that type of case, but as it applies to the bulk of cases it suggests at least that no equity arises, for it would be absurd that there should be an equity in the one case and not the other. Where the tax relief is spread over a number of years and the tenant for life dies or assigns his interest at the beginning of the period it is impossible to sustain the proposition that subsequent tenants are accountable for the tax benefit received by them during the rest of the period, for they would not have done anything in exercise of their fiduciary powers.

LORD EVERSHED M.R. The question raised on this appeal is whether the principle sometimes expressed by the formula "a trustee cannot make a profit out of his trust" and enshrined in the leading case of *Keech v. Sandford*¹ is applicable in respect of reliefs or allowances for income tax purposes which the first defendant obtained in respect of improvements executed by him on the Preshaw Estate, of which he is the tenant for life, by reason of the fact that the amounts expended on those improvements were refunded to him from capital moneys under the settlement, pursuant to the powers under the Settled Land Act, 1925, upon a direction which he had given, pursuant to the Act, to the trustees.

It is said, and it is the fact, that important questions of principle are involved, and we were asked to treat the matter as one of principle, without too strict a regard to its particular facts. Although I shall make a brief reference to the relevant provisions of the Income Tax Acts, which were summarized for us with great lucidity by Mr. Magnus, we have not seen any of the tenant for life's assessments to income tax and do not, therefore, know exactly what were the reliefs or allowances which he obtained, or under what sections of the Income Tax Act they were granted. On the other hand, it appears from the evidence that all the improvements with which we are concerned were paid for, in the first instance, by the tenant for life, and the cost was then

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¹ (1726) Sel.Cas.Ch. 61; White & Tudor's Leading Cas., 9th ed., Vol. 2, p. 648.

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refunded to him by the trustees. I confine my judgment to my view of the result on that basis of fact, and I say nothing of what might be the position both as to tax relief or otherwise if, for example, the cost of improvements were paid for by the trustees of the settlement direct to the contractors or others who did the work. The question was also raised by Mr. Jennings whether, as regards improvements falling within Part I of Schedule III to the Settled Land Act (as all the improvements here in question did or are to be deemed to have done by virtue of section 96 of the Agricultural Holdings Act, 1948, or otherwise), the trustees had any discretion in responding to the direction given to them by the tenant for life under section 75 of the Act, a question considered by Vaisey J. and by Harman J. in *In re Duke of Northumberland, decd.*² and *In re Sutherland Settlement Trusts*³ respectively. I do not propose to express any view on that matter. In the present case, if there was a discretion, it was exercised by the trustees in favour of the tenant for life; for the trustees paid over to the tenant for life the full amount of the cost or expenses which he had incurred.

[His Lordship stated the facts and continued:] I do not need to read many sections of the Settled Land Act. It is sufficient by way of reminder to state that the application of capital moneys, as in the present case, under section 73 (1) is treated as investment of those capital moneys. I observe, therefore, that in so far as they are so applied, capital moneys are provided in effect jointly by the remaindermen and the tenant for life according to their respective interests in those moneys. The conception of the Act may be stated as being that where capital moneys are so applied both the remaindermen and the tenant for life get the benefit, in accordance with their respective interests in the settled land, of the improvements to which the capital moneys are applied. But I should refer to section 75 and section 107 of the Act, since the argument here turns largely in effect upon those sections.

[His Lordship read the sections as set out above, and went on:] It is said for the respondents (and this argument appealed to Wynn-Parry J.) that one who is a trustee should never put himself in a position where his duty and his interest conflict, and that if a tenant for life exercises his power of direction under section 75 (which he must do as a trustee by virtue of section 107), any adventitious profit (and I use the phrase of counsel) which

² [1951] Ch. 202; 66 T.L.R. ³ [1953] Ch. 792; [1953] 2 All (Pt. 2) 1045; [1950] 2 All E.R. 1181. E.R. 27.

comes to him as a result of that exercise he must hold as a trustee for all the persons interested under the settlement. It is further said that if, as a result of doing these improvements, which are in fact and in truth paid for, in the end of all, by the trustees of the settlement out of capital money, he (the tenant for life) gets or is entitled to get certain personal benefits in the way of tax benefits, then those benefits or rights are adventitious profits which he (the tenant for life) must hold as a trustee for all those interested in the settlement.

On the other hand, it is said that the benefits or rights in the matter of taxation are personal rights which are conferred on the tenant for life as a taxpayer by Parliament as a consequence, not of the application of capital moneys by his direction, but as a consequence of his having, qua the person in occupation of the land, done to the land the improvements. It is said, moreover, that as tenant for life he is entitled under the will to all the income of the settled property and this right is not affected or qualified by tax liability or by any reduction in tax liability to which he may be entitled as the result of improvements done to the land, even though these improvements are ultimately paid for out of capital moneys.

At this stage I will fulfil my promise to make a brief reference to the effect of the relevant provisions of the Income Tax Act, 1952. The tenant for life's liability to income tax (and his consequential liability to surtax) may arise under Schedule A or Schedule D, as they are called. In the former case the tenant for life is charged with the tax in his capacity as the occupier of the land, and he is assessed in respect of the land occupied by him for every 20s. of the annual value of it. He is also liable to be charged under Schedule D in respect of the profits or gains arising or accruing to him from the business of farming which he may carry on on the land; and I add, to complete the matter, that he is or may be liable also to be charged in respect of rents which he may receive from any unit of land which are in excess of the annual value of that unit. But it is to be noted that the capacities which render him liable to be charged to tax either as an occupant or as a trader are capacities which he owes exclusively to his position as tenant for life in possession under the settlement.

As regards reliefs or allowances, these may (as I understand it) be of two kinds, so far as relevant to the present case; namely, first, in respect of expenses of a revenue character by way of maintenance, by virtue of sections 101 and 313 of the Act of

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1952; and, second, in respect of capital expenditure by way of improvements, etc., under section 314 of the Act; but, in the latter case, the reliefs or allowances, expressed to be by way of discharge or repayment, are spread over a period of 10 years, and so that, by subsection (4) of the section, in the event of a transfer of the taxpayer's interest in the land during the ten-year period, the benefit of the reliefs or allowances will pass, as regards the years subsequent to the transfer, to the transferee. This last point, as will later appear, is not without significance.

I have now referred sufficiently to the facts and to the provisions of the relevant statutes with which we are concerned. The question remains: which of the arguments which I have earlier formulated ought to be accepted? So that I may state my conclusion at once, I have come to a different conclusion from that entertained by Wynn-Parry J.; for, in my judgment, the argument of Mr. Russell ought to be preferred to that of Mr. Jennings.

The question in the end is a short one, and not capable of great elaboration. Though I see the force of Mr. Russell's point that the tax benefits, on the facts of this case, are, strictly speaking, derived from the doing of improvements rather than from the direction by the tenant for life to the trustees to invest capital moneys in refunding the cost of doing them to him, I prefer for my own part to base my conclusion on the essential fact that, by the terms of the will, the tenant for life is entitled to the whole income and enjoyment for the term of his life of the settled property. That enjoyment imposes upon the tenant for life, in his capacity as occupant of the land or trader thereon, the obligation for payment of income tax with which in those capacities he is liable to be charged. True it is that the amount of that charge is, by virtue of the Income Tax Act, reduced as a result of the improvements he has done and for the cost of which he has been recouped (at his direction) out of capital moneys. But that circumstance does not affect or qualify, in my judgment, his right to receipt of the whole income of the settled property. It is clear (as Mr. Jennings conceded) that, if he is liable to account to the trustees for a sum equivalent to the reliefs or allowances to which he becomes entitled, he must so account by payment back to the trustees of the sum in question out of the settlement income. To the extent, therefore, that he does so, he is no longer in receipt of the whole income of the settled property. If the relevant test is by reference to what he is given by the settlement (as I think that it is, in accordance

with the language of Collins M.R. in *In re Biss*⁴), then the scope of the gift is the entire income of the settled property, not that income less some part of it calculated by reference to the allowances for income tax purposes to which he may become entitled upon being assessed for income tax purposes as the person so entitled for his life to full enjoyment of the settlement property and its income for the time being. The case is different, therefore, from the type of case (of which *Williams v. Barton*⁵ is an example) where, as the result of the exercise of some power vested in a donee of the power as trustee, the donee becomes entitled to the receipt of some payment distinct from and additional to the income or other sums to the enjoyment of which he is entitled by the terms of the trust instrument.

Mr. Buckley's argument rested upon the premise that the powers and duties of trustees under sections 73 and 75 of the Settled Land Act do not extend beyond indemnifying the tenant for life to the extent that he was or would be in fact out of pocket in respect of improvements undertaken by him. I cannot agree as a matter of construction of those sections. What the trustees may be called upon to do by way of investment and what in fact they have done in this case is to refund the actual and total cost of the improvements. No doubt at first sight it may seem wrong that a tenant for life has in the end provided no part of the cost of the improvements and yet has been (so to say) enriched to the extent that he has got reliefs or allowances in respect of his income tax liability granted on the footing that, and as though, he had personally provided the cost of the improvements out of his own pocket. But the question in the end is: to what is the tenant for life entitled under the settlement?—and to that question the answer seems undoubtedly: the whole income of the settled property.

Instances were cited showing, *prima facie*, the anomalous results that would ensue if the view of the trustees were to prevail. Thus, in the case of improvements falling within Part III of Schedule III to the Settled Land Act, and where, therefore, capital moneys provided by the settlement trustees would have to be recouped (*prima facie* out of income) by the tenant for life to the settlement trustees, the question was asked: would the tenant for life still have to account for a sum equivalent to his income tax reliefs, though in the end of all he would himself have provided the whole cost of the improvements? To this question Mr. Jennings and Mr. Buckley appeared to give

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⁴ [1903] 2 Ch. 40, 56.⁵ [1927] 2 Ch. 9; 43 T.L.R. 446.

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different answers. Another question put, arising out of the case where the reliefs and allowances under section 314 of the Income Tax Act are in effect spread over a ten-year period, was this: in the case where the original tenant for life who had in fact done the improvements died during the ten-year period, or transferred his interest to some other person, would the succeeding life beneficiary or the transferee be under an obligation to account for the amount of the reliefs that he would obtain during the remainder of the ten-year period? I understood counsel for the trustees to give an affirmative answer to this question, though it is quite plain that the successor or transferee had never in any relevant respect been clothed with the garb of a trustee. Mr. Jennings said that these problems and others like them were mere matters of accounting; but, in my judgment, that answer is not satisfactory. In my judgment, the problem which underlies these questions goes deeper and indicates that the question of tax liability for present purposes is in truth distinct from the beneficial right to the receipt of the income under the trust instrument.

It is plain that the gift of income without qualification to a tenant for life imposes in any case some limit to the application of the strict *Keech v. Sandford*⁶ doctrine. Thus, a direction by a tenant for life to reinvest in a form which would result in increased income to him (for example, where, being himself a foreign resident, he directs reinvestment in investments the income of which is not liable to deduction of income tax in the trustees' hands) will not, if otherwise justifiable, impose any liability on the tenant for life to account for the added income benefit which he receives. This conclusion follows inevitably from the fact that the tenant for life is, by the benefaction of the testator or settlor, entitled to the whole income; and it is that circumstance which, in my judgment, provides the answer to the present case, as I have more than once observed, since to my mind the trustees' view necessarily involves a qualification on the extent of that benefaction.

I add, in conclusion, that no assistance, in my view, is obtained in the present case from the principle underlying decisions such as *In re Pettit*.⁷ It was pointed out by this court in *In re Batley* (No. 2)⁸ that the ratio of those decisions is that, by the express terms of the gift, the right of the annuitant is limited

⁶ Sel.Cas.Ch. 61.

⁸ [1952] Ch. 781; [1952] 2 All

⁷ [1922] 2 Ch. 765; 38 T.L.R. E.R. 562.

to such sum (no more and no less) as is calculated by reference to the actual tax liability of the annuitant: the rejection of the argument in those cases that tax liability of the annuitant is nihil ad rem by no means involves the rejection of a similar argument in the present case. In the *Pettit*⁹ type of case, the argument was held to be untenable because the extent of the relevant benefaction was expressed by reference to the tax liability. In the present case, the right of the tenant for life to the full enjoyment of the settled property and its income during his life is not by the terms of the settlement made subject to or by reference to any such limitation.

In the result, I think, with all respect to the contrary view of Wynn-Parry J., that this appeal ought to be allowed.

JENKINS L.J. I agree, and there is very little I can usefully add.

The appellant, as tenant for life under the settlement of the Preshaw Estate, made certain improvements on the settled lands of kinds which, by the joint effect of section 73 (1), paragraphs (iii) and (iv), section 83 and section 84 of the Settled Land Act, 1925, Part I of Schedule III to the same Act, and sections 81 (1) and 96 (1) of the Agricultural Holdings Act, 1948, were proper to be paid for out of capital money subject to the settlement, without any replacement of the costs out of income; and, pursuant to directions given by the tenant for life under section 75 (2) of the Settled Land Act, 1925, the costs of such improvements were duly paid out of capital money by the trustees of the settlement. I understand that the costs of the improvements in question were in the first instance paid by the tenant for life, and that the payment out of capital money thus took the form of repayment to him of the amount he had expended.

It was accepted on both sides before us that, for the purpose of computing the liability of the tenant for life for income tax, the improvements fall to be treated as having been made at his expense. I do not know whether the position would have been the same if the costs had been paid directly by the trustees instead of being paid by way of recoupment to the tenant for life of the amounts expended by him. This aspect of the matter was not investigated before us, but it was not suggested that as between the tenant for life and the revenue, he would not be correctly treated for income tax purposes as the person at whose

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⁹ [1922] 2 Ch. 765.

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expense the improvements with which we are now concerned were made. I, therefore, proceed on the assumption that he would be rightly so treated.

On this assumption, the tenant for life became entitled to certain income tax allowances or reliefs in respect of the improvements for which the trustees had paid out of capital money, the effect of which was to make the total amount of tax payable by him less than it would have been if the improvements had not been carried out. The trustees claim that the tenant for life must account to them for this saving of tax, or, in other words, for such part of his income as, but for the allowances or reliefs in respect of the improvements, would have been absorbed in tax, but which in consequence of such allowances or reliefs has not, or will not be, so absorbed; and this claim was upheld by Wynn-Parry J. in the judgment under appeal.

The reasoning on which the trustees base their claim is to this effect: first, they point out that the improvements were paid for out of capital money pursuant to directions given by the tenant for life under section 75 (2) of the Act of 1925. Next, they refer to section 107 (1) of the same Act. [His Lordship read section 107 (1), and continued:] They proceed to argue that, in giving directions that capital money should be applied in payment for the improvements, the tenant for life was exercising a power under the Act which, by virtue of section 107, was a fiduciary power; that by means of his exercise of that power, he has secured a benefit for himself in the shape of the amount of income tax which he has saved, or will save, through allowances or reliefs granted, or to be granted, in respect of the improvements; that a trustee cannot profit from his trust (see, for example, *Keech v. Sandford*¹⁰); and consequently that the tenant for life is liable to account as claimed.

This deceptively simple line of reasoning appears to me to be misconceived. It is no doubt true that a tenant for life is a trustee of his statutory powers. But he is also a beneficiary under the settlement, entitled to the whole of the income of the trust property, whether in the form of land or of capital money. A direction by him by which he gains some benefit involves no breach of trust, provided that the benefit which he gets does not go beyond what he is entitled to in right of his beneficial interest. An example was given in the course of the hearing of a change of investment by direction of the tenant for life consisting of the

¹⁰ Sel.Cas.Ch. 61.

substitution of an authorized investment yielding six per cent., for an authorized investment yielding only four per cent. In such a case, the tenant for life would have benefited himself by the direction which he gave, but obviously he would have committed no breach of trust, and would not be accountable to the remaindermen for the increase of two per cent. in the income derived from the capital money which was the subject of the change of investment.

The transactions now in question, namely, the execution of the improvements and the payment of the costs of making them out of capital money, were perfectly regular and proper transactions, and if the income of the tenant for life was thereby increased he was getting no more than he was entitled to get in right of his beneficial interest. Therefore, he cannot be held accountable, as on a breach of trust, for any resulting increase in his income, on the ground that the improvements were carried out under his direction pursuant to section 75 (2) of the Act of 1925. I see no distinction, for the present purpose, between improvements properly paid for out of capital money which result in an increase in the income enjoyed by the tenant for life in right of his beneficial interest, and improvements properly so paid for which have the effect of reducing the amount of tax exigible on the income enjoyed by the tenant for life in right of his beneficial interest. If agricultural land were wholly exempt from income tax, the tenant for life would be entitled to enjoy the whole income of the settled land tax free. Why should he not equally be entitled to enjoy such qualified exemption from tax as the law affords? His right under the settlement is to receive the whole income subject to such income tax thereon as may be properly exigible under the fiscal legislation for the time being in force.

The tenant for life, being entitled in that capacity to possession or receipt of the rents and profits of the settled land, including the improvements, is liable to pay income tax thereon, either in respect of the annual value imputed to the property in respect of his own occupation—that is Schedule A—or on the rents he derives from it—that, I think, is Schedule D, Case VI—or on the profits of any farming business he may carry on upon it; that is Schedule D, Case I. This is an incident attached by income tax law to his beneficial interest as tenant for life in possession. The amount of tax he has to pay depends on the principles governing assessment, reliefs, and allowances under the income tax law for the time being in force. If, according

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to the income tax law for the time being in force, regularly applied, he is entitled to and obtains some allowance or relief in respect of an improvement paid for out of capital money, I cannot see that this gives the persons interested in remainder any legitimate cause for complaint, or for claiming that the tenant for life has received something more than he is properly entitled to in right of his beneficial interest as tenant for life. The liability to income tax attaching to his beneficial interest is his, and his alone; and I should have thought that the benefit of any reduction he can properly secure in the amount of tax payable by him is likewise his and his alone. There may or may not be room for two opinions on the question whether a tenant for life should be allowed a reduction of tax in respect of improvements paid for out of capital money. But if he is by law so entitled, his liability to tax must be measured on that footing, and so measured must be taken as representing his proper tax liability.

To sum up the matter, a tenant for life makes improvements proper to be paid for out of capital money; directs, as he is entitled to do, that those improvements should be paid for out of capital money; receives, as he is entitled to do, the whole income of the settled property including the improvements; and pays, as he is bound to do, the tax properly exigible on his income, in the computation of which an allowance is properly, according to the law of income tax for the time being in force, made in respect of the improvements. How, then, can he be said to have received anything more than he was entitled to receive in right of his beneficial interest, or secured by way of exemption from tax anything more than he ought to have secured on the income properly belonging to him, or to have benefited himself at the expense of those interested in remainder? I fail to see how he can rightly be said to have done any of these things.

The trustees do not say that the tenant for life ought to pay, or ought to have paid, more tax. That could clearly be no concern of theirs. But they do say—and this seems to me to be the most plausible way in which their argument can be put—that the reduction in tax obtained or obtainable by the tenant for life in respect of the improvements was bought with capital money, because the improvements to which the reduction is attributable were paid for out of capital money. This enables them to present the tenant for life as a trustee who has bought an advantage for himself out of trust money, and who must

clearly account for such advantage. But there is, to my mind, a fatal flaw in this argument. What was paid for out of capital money was the proper cost of improvements properly so paid for. The tax advantage gained by the tenant for life is merely a product of the application to the income of the tenant for life of the principles according to which, under the income tax law for the time being in force, his liability to income tax falls to be measured.

I would allow this appeal.

HODSON L.J. I agree.

Appeal allowed.

Solicitors: *Fairfoot & Co.; Ashley, Tee & Sons.*

E. D.

In re EDWARDS, DECD.
MACADAM *v.* WRIGHT AND OTHERS.

[1955 E. 344.]

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Oct. 13.

Upjohn J.

Will—Election—Disposition after will—Disposition by will of freehold property and residuary estate to seven beneficiaries—Subsequent effective contract to devise freehold property to one beneficiary—No ademption thereby of devise—Beneficiary required to elect—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24.

A testatrix by her will dated February 8, 1952, directed that No. 78, Albion Road, Hounslow, together with the remainder of her estate both real and personal should be divided among seven named beneficiaries who included W.

In May, 1952, the testatrix and W. entered into an oral agreement whereby in consideration of W. agreeing to come and reside with the testatrix and perform certain household duties for her the testatrix promised, *inter alia*, to devise No. 78, Albion Road to W. by her will. On June 1, 1952, in pursuance of this agreement, W. came to live with the testatrix until the death of the testatrix on July 30, 1952.

The testatrix's will was proved in July, 1952, by her executor, the plaintiff, and on October 2, 1953, by an order of Danckwerts J., the said oral agreement was declared a binding contract between the testatrix and W. and No. 78, Albion Road was accordingly conveyed to W.

[Reported by JENNIFER WEST, Barrister-at-Law.]

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By this summons the plaintiff then asked whether or not W. was bound to elect between the one-seventh share of the property, No. 78, Albion Road, together with the residue of the testatrix's estate bequeathed to her by the said will, and the said property; or whether she was entitled to take both:—

Held, that W. was bound to elect: since there had been a disposition of W.'s property and she had also received other benefits under the will, and it made no difference whether or not the will or other act or disposition came first, since by virtue of section 24 of the Wills Act, 1837, the will spoke of the property comprised in it at the death.

Cooper v. Cooper (1874) L.R. 7 H.L. 53 applied.

ADJOURNED SUMMONS.

By her will dated February 8, 1952, Henrietta Phoebe Edwards (hereinafter called "the testatrix"), after appointing Thomas Sebastian Macadam (hereinafter called "the plaintiff") as executor, and after giving certain specific and pecuniary legacies, provided as follows: "I direct that 78, Albion Road, Hounslow, and the remainder of my estate and effects real and personal of which I may die possessed be sold and the proceeds divided equally amongst the following relatives who may survive me."

The testatrix then named seven beneficiaries, Elise Mary Wright, her sister and the first defendant (hereinafter called "the first defendant"), Isaac James Ravenhill, Arthur Donald Ravenhill, Sydney Harold Ravenhill, Reginald Alfred Ravenhill, Helen Ravenhill, the second, third, fourth and fifth defendants respectively, and Henrietta Ravenhill, who died on May 5, 1954, and whose personal representative was the aforesaid Sydney Harold Ravenhill, the sixth defendant (the said defendants are hereinafter referred to as "the second, third, fourth, fifth and sixth defendants").

In or about May, 1952, the testatrix and the first defendant entered into an oral agreement whereby in consideration of the first defendant giving up her tenancy of the premises then occupied by her and coming to reside in two rooms at No. 78, Albion Road, aforesaid, where the testatrix was then living, and undertaking certain household duties for the testatrix, she would allow the first defendant to occupy the said two rooms rent-free during the joint lives of the first defendant and herself, and would leave the said property to her absolutely by her will.

On June 1, 1952, pursuant to the said agreement, the first defendant went into occupation of the said two rooms and carried out her part of the bargain until the death of the testatrix

on July 30, 1952. Her will was proved by the plaintiff on September 20, 1952, out of the Principal Probate Registry, but a codicil thereto whereby the testatrix attempted to devise to the first defendant No. 78, Albion Road did not comply with the provisions of the Wills Act, 1837, and, accordingly, was not admitted to probate.

By an order of the court dated October 2, 1953, and made by Danckwerts J., it was declared that the aforesaid oral agreement constituted a "valid and binding contract" between the testatrix and the first defendant and, accordingly, the said property was conveyed to her on January 25, 1954, by the plaintiff.

By this summons the plaintiff then asked whether, having regard to the disposition of No. 78, Albion Road in the testatrix's will, the first defendant was bound to elect between the one-seventh share of residue together with the property, No. 78, Albion Road, bequeathed to her by the said will, and the said property: or whether she was entitled to both the said property and her full share of the residuary estate. The said property was valued at £2,000 and the residue exclusive of the house at £5,000. Further, it was conceded that if a case of election arose, the first defendant had in fact elected against the will.

Raymond Walton for the plaintiff.

S. W. Templeman for the first defendant. It is conceded that had the will been executed after the agreement then a case of election would arise, but the gift in the will was here adeemed by the subsequent contract and election does not, therefore, apply. The doctrine of election is founded on the highest principles of equity—see the statement of Lord Cairns L.C. in *Cooper v. Cooper*¹—and can have no application to the facts here, where the first defendant gave value for the benefit she received. If election applies here, it must apply in every case of ademption even where the testator and beneficiary can have had no appreciation of the result of their actions. The will speaks from the death, but where a gift is adeemed, it is taken out of the will and election cannot apply: see *Jarman on Wills*, 8th ed., Vol. 2, p. 1137. Ademption indicates that the testator has changed his mind and accordingly cannot have intended the doctrine of election to apply. In *Sanger on Wills*, 2nd ed., p. 74, it is stated: "a gift which is afterwards adeemed or revoked "cannot raise a question of election." *Plowden v. Hyde*² also supports this statement.

¹ (1874) L.R. 7 H.L. 53, 67.

² (1852) 2 Sim.N.S. 171.

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T. A. Jones for the second, third, fourth, fifth and sixth defendants. Ademption differs from revocation: once the intention to dispose of property away from the person to whom it belongs is discovered in a will then a case of election arises and no further inquiry can be made as to the testator's intentions unless there has been a revocation of the will. Ademption falls under a different category from revocation and signifies the failure of the gift through the impossibility of carrying it into effect. It is immaterial under the doctrine of election to discover how the property becomes another's: see the statement by Lord Hatherley in *Cooper v. Cooper*.³

The will speaks from the death and the date of death is, therefore, the only relevant date to consider: *Cooper v. Cooper*.⁴ In *Plowden v. Hyde*⁵ the testator died before the Wills Act, 1837, was passed and the will accordingly spoke from the date of its execution: it was also a question of construction of that particular will. *In re Slater*⁶ shows that where ademption occurs through disappearance of the subject-matter after the date of the will this has no effect on the intention as expressed in the will. [*Grissell v. Swinhoe*⁷ was also referred to.]

S. W. Templeman in reply. *In re Slater*⁸ does not show whether or not ademption is equal to revocation.

UPJOHN J. This summons raises an interesting question as to whether the first defendant is put to her election in taking certain benefits under the will of her sister, the testatrix. The doctrine of election cannot arise in respect of a true residuary gift, but it is conceded on the first defendant's behalf that the express mention of No. 78, Albion Road in the residuary gift brings it within the doctrine, although it is submitted on her behalf in fact that the doctrine is not applicable in the circumstances of this case.

[His Lordship stated the facts, and continued:] Mr. Templeman, for the first defendant, admits that, had the will been executed after the agreement between the sisters, a perfect case of election would arise, but he contends that, as the will is dated before the agreement, which, I infer, was made very probably in May, 1952, it is not a case of election at all, but there has been an ademption of the gift as a result of the agreement and, therefore, she is entitled to participate in the residue without any

³ L.R. 7 H.L. 53, 70.

⁴ L.R. 7 H.L. 53.

⁵ 2 Sim.N.S. 171.

⁶ [1907] 1 Ch. 665.

⁷ (1869) L.R. 7 Eq. 291.

⁸ [1907] 1 Ch. 665.

election. He submits that the effect is that it is as though the testatrix had changed her mind and had revoked the gift of 78, Albion Road by some codicil, and he submits that ademption is only another form of revocation.

The doctrine of election is not in doubt, and I think that it will be sufficient for my purpose if I quote a passage from Jarman on Wills (8th ed., Vol. 1, p. 545), which appeared in the first edition, and, according to a footnote, has received judicial approval: “ ‘The doctrine of election,’ says Mr. Jarman, may ‘be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator’s attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator’s disposition, equity will sequester the property given to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.’ ” On the next page there is this paragraph: “It must, however, be understood that the obligation attaches on whoever at the testator’s death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner’s title was derived.”

The footnote cites the House of Lords decision of *Cooper v. Cooper*¹ as the authority for that statement. In my judgment that is a perfectly accurate statement of the law as it is set out by Lord Hatherley²: “The condition, or rather obligation (which ‘is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this—the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed

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¹ (1874) L.R. 7 H.L. 53.

² Ibid. 70.

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“ his intention of disposing of what belongs to another—when
“ once that is ascertained completely, there is nothing else which
“ the law implies, with regard to his intention, beyond the
“ ordinary intent implied in every man who affects by a legal
“ instrument to dispose of property, that he intends all that he
“ has expressed, and, among other things, that he intends to
“ dispose of property as to which he has so expressed an inten-
“ tion, though it really does not belong to him. When once that
“ intention is ascertained there is nothing else remaining to be
“ done, with reference to election, than to see who is in posses-
“ sion and who is the real owner of the property; and if you find
“ him, who is the real owner of the property at the same time
“ taking a benefit under the will which has erroneously
“ endeavoured to dispose of his property, then he must give effect
“ to that intention, though founded in error, and give it full
“ effect by either abandoning all his interest under the will, or
“ making compensation to the extent of the value of the
“ disappointed intention of the testator.”

On the other hand, Mr. Templeman says that the principle is one founded upon the highest principles of equity, and he refers me to a statement in the speech of Lord Cairns L.C.³: “ The
“ rule, as was said during the argument at the bar, does not
“ proceed either upon an expressed intention, or upon a con-
“ jecture of a presumed intention, but it proceeds on a rule of
“ equity founded upon the highest principles of equity, and as to
“ which the court does not occupy itself in finding out whether
“ the rule was present or was not present to the mind of the
“ party making the will.”

He submits that where, as here, there is a transaction for value after the will, there is no ground for admitting this doctrine, for no principle of equity requires it to be admitted. Indeed, there is a hardship to the first defendant, for she has in the eyes of the law given full value for the property which she has acquired, and there is no reason therefore to exclude her from participation in the remainder of the estate. Mr. Templeman points out that in *Cooper v. Cooper*,⁴ unlike the present case, the will followed the disposition, and it is the cardinal point that in this case the will here precedes the disposition. He also referred to the earlier case of *Plowden v. Hyde*,⁵ which he submitted supported his contention that no case of election arises where the will preceded the other disposition. I do not propose

³ L.R. 7 H.L. 53, 67.

⁵ (1852) 2 Sim.N.S. 171.

⁴ L.R. 7 H.L. 53.

to delve into the complicated case of *Plowden v. Hyde* ⁵ for two reasons. First, the main basis on which the case proceeded, which involved the construction of a will, was overruled by the Court of Appeal. Secondly, the whole case depended upon the law then in force which was before the Wills Act of 1837, namely, that under the pre-1837 law the will spoke as at its date and not at the date of the death. Shortly, Sir Richard Kindersley V.-C. seems to have decided that under the law as it stood the testator had acquired a new title to the property subsequent to the will by the mere reconveyance of some mortgage. The case amounted to this, that in the view of Kindersley V.-C. the will was not intended to operate upon the subsequent estate acquired by the testator and therefore it was undisposed of and passed to the heir-at-law. That being the construction that he adopted (erroneously, as the Court of Appeal held), there was no room for the application of the doctrine of election. I do not think that that case assists me.

Mr. Templeman also relied on a passage in Jarman on Wills (8th ed., Vol. 2, p. 1137) where there is a discussion as to the distinction between satisfaction and ademption. The passage is this: "Thus in cases of satisfaction the will is subsequent to the settlement or debt; the intention to satisfy is to be found in, or presumed to be found in, the will; a case of election must arise; and the objects of the covenant or creditors must be the legatees. In cases of ademption, on the other hand, the will is prior to the settlement; the intention to revoke the gift cannot be found in the will, but must be found in some act subsequent to the will; election cannot arise; and the objects of the covenant and of the bequest need not be the same." The phrase "election cannot arise" at one time troubled me a little, but I do not think that in that passage Mr. Jarman or the editor had in mind a case where the person taking property previously given by the will by some transaction with the testator (for value or not) subsequent to the will is also entitled to some completely different property under the provisions of that prior will. Where that conjunction of circumstances is present then, in my judgment, a question of election may arise.

I return to the principle, which I need not restate. Here, there is a will which speaks under section 24 of the Wills Act, 1837, of the property comprised in it at the death. By that will

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⁵ 2 Sim.N.S. 171.

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the testatrix has expressed the clearest possible intention to dispose of 78, Albion Road. Accordingly, applying the principle, if the sister, the first defendant, desires to accept a benefit in respect of some quite different property under that will, she must be prepared to adopt the whole contents of the instrument, conform to all its provisions, and renounce every right inconsistent with them. In my judgment, the speech of Lord Hatherley, which I have already quoted, makes it quite clear that the question whether the will or other act or disposition comes first does not matter in the least degree. Since the Wills Act of 1837, all that has to be found is the disposition of the property of another who receives other benefits under the will. Accordingly, I must declare that the first defendant is bound to elect between the property, 78, Albion Road, and the residue of the estate, and has, in fact, elected to take the property.

Declaration accordingly.

Solicitors: *Anthony Gane & Co., Richmond; Charles Robinson & Son, Hounslow.*

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 Oct. 4.

BARCLAYS BANK LTD. v. STASEK AND ANOTHER.

Danckwerts J.

[1955 B. 3929.]

Mortgage—Subject to tenancy—Surrender—Weekly tenancy—Charge by way of legal mortgage subject to tenancy—Landlord's powers of leasing without consent excluded—Further tenancy without such consent—Surrender of first tenancy by operation of law as between landlord and tenant—First tenancy still binding on mortgagee.

A landlord granted the defendants a weekly tenancy of rooms on the first and second floors of his freehold house. In April, 1948, he charged the property by way of legal mortgage in favour of the plaintiff bank subject to the tenancy: the charge excluded the landlord's statutory powers of leasing without the bank's consent. In September, 1951, the landlord granted the defendants a fresh tenancy of rooms on the second floor and, as between himself and the defendants, the first tenancy ceased to operate. The bank did not give its consent to the new tenancy. In 1952 there was a further letting to the defendants of rooms on the second floor,

[Reported by JENNIFER WEST, Barrister-at-Law.]

thereby, as between the landlord and defendants, effecting a surrender of the second tenancy by operation of law. The bank again did not give its consent.

In 1955 the bank obtained an order for possession of the property against the landlord, who vacated the premises, but the defendants claimed that they were entitled to remain either in the second floor rooms occupied by them or in the rooms occupied by them under the original agreement, one of the said rooms having been occupied by them throughout.

On a summons brought by the bank against the tenants to recover possession:—

Held, that as the second tenancy was ineffective as against the bank, being beyond the landlord's powers under the legal charge, the surrender by operation of law of the original tenancy was also ineffective as against the bank; so that the tenants were entitled to resume occupation of the rooms comprised in the original tenancy.

Cadle v. Moody (1861) 7 Jur.N.S. 1249; *Doe d. Egremont (Earl) v. Courtenay* (1848) 11 Q.B. 702; *Doe d. Biddulph v. Poole* (1848) 11 Q.B. 713 applied.

ADJOURNED SUMMONS.

Under a weekly tenancy agreement made orally in July, 1947, between Vaclav Curzon (hereinafter called "the landlord") and Hugo Stasek and Annette Eliza Stasek, his wife (hereinafter called "the defendants"), the defendants occupied two rooms on the first floor and one back room on the second floor of a freehold house situate at 94, Palmerston Road, Wood Green, Middlesex, at a rent of £1 a week. The property was registered land under the Land Registration Act, 1925, and the tenancy fell within the protection of the Rent and Mortgage Interest Restrictions Acts, 1920–1939.

On April 23, 1948, the landlord charged the property by way of legal mortgage under the Land Registration Act, 1925, subject to the aforesaid weekly tenancy, in favour of the plaintiff, Barclays Bank Ltd. (hereinafter called "the bank"). The charge contained a clause requiring that the landlord's powers of leasing and accepting surrender of leases under sections 99 and 100 of the Law of Property Act, 1925, should only be exercised with the written consent of the bank.

In September, 1951, the landlord granted the defendants a new tenancy at a rent of 15s. a week of two rooms on the second floor: one of the said rooms being the back room occupied by the defendants under the old tenancy, and the defendants thereupon ceased to occupy the first floor rooms. The bank was not asked for, nor did it give its consent, to this new tenancy.

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In 1952 there was a third letting to the defendants of three rooms on the second floor at a rent of £1 a week: one of the said three rooms being the back room which was throughout in the defendant's occupation. The consent of the bank was not obtained to this tenancy agreement.

On March 9, 1955, the bank obtained an order for possession of the property against the landlord, who thereupon went out of possession. The defendants, however, claimed that they were entitled to remain either in the second floor rooms occupied by them or in the rooms occupied by them under the original tenancy agreement, and the bank accordingly took out this summons in order to recover possession from them.

R. M. Bell for the bank. The second and third lettings were ineffective against the bank by reason of sections 99 and 100 of the Law of Property Act, 1925, and the terms of the mortgage, since they were entered into without the bank's consent. The bank can, therefore, claim possession since there has been effective surrender by operation of law of the first tenancy.

[He was stopped.]

John Montgomerie for the defendants. The validity of a new lease depends upon the surrender, either express or by operation of law, of the former lease being effective: it is conditional on such surrender taking effect. *Cadle v. Moody*¹; *Doe d. Egre-mont (Earl) v. Courtenay*²; *Doe d. Biddulph v. Poole*.³ Since it is conceded that the second and third lettings were ineffective as against the bank, the surrender of the first tenancy by operation of law, although it operated as a surrender between the landlord and tenant, was ineffective against the bank.

Alternatively, if the bank adopts the landlord's surrender of the first tenancy, then the bank is bound in the same way as the landlord is bound by the new tenancy: the principle of *Solle v. Butcher*⁴ applies by analogy.

R. M. Bell in reply. The second and third tenancies were not granted under the landlord's statutory powers of leasing nor were they protected by the Rent and Mortgage Interest Restrictions Acts, 1920-1939: *Dudley and District Benefit Building Society v. Emerson*.⁵ The later tenancies were accordingly ineffective against the bank. Surrender by operation of law by a tenant

¹ (1861) 7 Jur.N.S. 1249.

² (1848) 11 Q.B. 702.

³ (1848) 11 Q.B. 713.

⁴ [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

⁵ [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

protected by the Rent Restriction Acts does not fall under any different category from surrender by a tenant at common law: *Foster v. Robinson*⁶ supports this view. The bank is entitled to recognize the surrender and not the later tenancies. *Parker v. Braithwaite*⁷ establishes that the bank's failure to evict the defendants as trespassers earlier does not amount to such recognition of the later tenancies as to deprive the bank of its right to possession. [Reference was also made to *Rogers v. Hyde*.⁸]

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DANCKWERTS J., having stated the facts, continued: It is plain that, as the consent of the bank was not obtained for the second or third lettings, those lettings, on the face of it, would not be effective against the bank by reason of sections 99 and 100 of the Law of Property Act, 1925, and the terms of the mortgage. At first it appeared to me that there could not be a possible defence to the bank's claim; but a point has been taken, which is rather a nice point, and which is, in my judgment, effective.

Between the landlord and his tenants, the effect of each of the subsequent second and third lettings was that they were effective lettings against the landlord and, being effective lettings, by operation of law they created a surrender of the existing tenancy. In other words, so far as the provision between the landlord and his tenants is concerned, the original letting in 1947 was terminated by operation of law through the effect of a surrender upon the creation of the new tenancy and, so far as the landlord was concerned, came to an end; but it is claimed by the bank that the result of that is that the original tenancy, effective against the bank, no longer exists, because it is said that the bank can accept that surrender as being effective without recognizing the second tenancy as being effective by operation of law.

There are authorities which show that when a lease is granted with the result of effecting a surrender of an existing lease, and the second lease is not effective in law because it exceeds the powers which the lessor had, then the surrender, whether it appears that it was an express surrender or a surrender through operation of law, is ineffective, and consequently the original term remains effective. That is brought out very clearly in *Cadle v. Moody*,¹ which was a case of a surrender by operation

⁶ 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

⁸ [1951] 2 K.B. 923; [1951] 2 All E.R. 79.

⁷ [1952] 2 T.L.R. 731; [1952] 2 All E.R. 837.

¹ (1861) 7 Jur.N.S. 1249.

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of law. Other authorities on the same point are *Doe d. Egremont (Earl) v. Courtenay*,² which was the case of an express surrender, and *Doe d. Biddulph v. Poole*.³

I must therefore apply the principle of those cases to the circumstances of the present case (although, of course, the facts in those old cases were considerably different from the present), as they established a principle which, indeed, seems to me to be easier of application in the case of a surrender which is only operative through law than in the case of an express surrender, even though (as I have observed) the same rule has been extended to the case of an express surrender. The principle is this, that if there is a new lease which is not effective but which, on the basis that it is effective, produces a surrender, then, by reason of the fact that it is not effective, there cannot be an effective surrender.

Now I turn to the argument of the bank in the present case, when they claim that they are entitled to recognize the surrender but not to recognize the new tenancy. It seems to me that that argument cannot succeed because there is no surrender except through the new tenancy. It is a surrender by operation of law simply because the new tenancy cuts through the old. If the old is not cut short because the new tenancy is not operative, then the old tenancy remains, and there is no effective surrender. In the present case it is claimed that the new tenancy was not effective against the bank unless the bank, of course, chose to affirm and recognize it. Consequently, so far as the bank is concerned, there seems to me to have been no effective surrender of the tenancy created in August, 1947. It was a weekly tenancy and, of course, a weekly tenancy continues until it is determined by a week's notice, or until it is determined by surrender or in some other manner. It is one of those continuing tenancies which go on and on. In the present case it produces very odd results because the defendants are in occupation of rooms to some extent different from those which were included in the tenancy on which they find themselves bound to rely; but I am forced to the conclusion that there has been no effective surrender of the original tenancy against the bank, and consequently it is open to the defendants to resume occupation of their old rooms, including the one which they still occupy (because, apparently, there are no other tenants in those

² (1848) 11 Q.B. 702.

³ (1848) 11 Q.B. 713.

rooms) and that claim is effective against the bank. The summons accordingly must fail.

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Declaration accordingly.

Solicitors: *Forbes & Son; Joynson-Hicks & Co. for J. Burt Sugar & Co., Palmers Green.*

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[1955 R. No. 1408.]

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Mortgage—Sale—Statutory power—Agreement for lease—Authorized assignment of benefit of agreement—Equitable charge by assignee in favour of assignor—Second equitable charge by assignee in favour of plaintiff—Statutory power of leasing excluded in both charges—Unauthorized grant of underlease by mortgagor—Grant of lease to mortgagor—Confirmatory legal charge by mortgagor in favour of first mortgagee—Contract for sale of and conveyance of lease by first mortgagee to plaintiff—Contract but not conveyance expressed to be subject to underlease—Claim for possession by plaintiff against underlessee—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), ss. 87, 89 (1) (a).

C.-R., in January, 1951, entered into an agreement for a lease of a dwelling-house for a term of 11 years. In July, 1953, he assigned the benefit thereof to W.-H., who thereupon charged his interest in favour of C.-R. In November, 1953, W.-H. executed a further charge in favour of the plaintiff. Notwithstanding the fact that both mortgages contained provisions excluding all statutory powers of leasing, W.-H. granted an underlease of the first floor of the property to the defendant.

In February, 1954, pursuant to the agreement of January, 1951, a lease was granted to W.-H. and he was thereafter precluded from denying that the defendant had a valid underlease. In April, 1955, W.-H. executed a confirmatory legal charge in favour of C.-R. who in exercise of his statutory powers of sale entered into a contract to sell the property to the plaintiff. The contract contained conditions that the sale was made subject to and with the benefit of the underlease of which the plaintiff had notice, but C.-R. "gives no warranty as to the validity or otherwise" thereof, and was made subject also to the plaintiff's equitable charge. The conveyance contained no reference to the underlease, although notice was given to the defendant that the aforesaid condition was

[Reported by JENNIFER WEST, Barrister-at-Law.]

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contained in the contract, but it was expressed to be subject to the plaintiff's charge.

In June, 1955, the plaintiff claimed possession of the first floor from the defendant:—

Held, granting the plaintiff's claim for possession, (1) that the right of the mortgagee to treat a tenant of the mortgagor as a trespasser was a right which passed on sale or foreclosure to his assignee.

Doe d. Downe (Lord) v. Thompson (1847) 9 Q.B. 1037 followed.

Smith v. Phillips (1837) 1 Keen 694 considered.

(2) That such rights passed without express assignment and that the contract containing the condition that the sale should be subject to the benefit of the underlease was superseded by the conveyance which contained no such provision.

Smith v. Widlake (1877) 3 C.P.D. 10 followed.

(3) That the mortgagee had never waived his rights against the defendant and no representation made to the defendant after contract could deprive the plaintiff of her rights as assignee and, further, that the plaintiff herself had in no manner waived her rights.

Davenport v. Smith [1921] 2 Ch. 270; 37 T.L.R. 909 distinguished.

(4) That no legal estate was created between mortgagee and tenant under an unauthorized lease and, accordingly, no question of priority of legal estates as between the plaintiff and the defendant arose.

Observations of Farwell J. in *Iron Trades Employers Insurance Association v. Union Land and House Investors Ltd.* [1937] Ch. 313, 317; 53 T.L.R. 341; [1937] 1 All E.R. 481 applied.

(5) That under a sale by a mortgagee, where the mortgage was created by way of legal charge, the plaintiff acquired from the mortgagee alone the entire estate in the property including the mortgagor's expectancy on the expiration of the mortgagor's term of years, so that the plaintiff was not affected by the mortgagor's disabilities.

Doe d. Downe (Lord) v. Thompson, *supra*, considered.

Per curiam. The rights of the plaintiff as second mortgagee were extinguished on sale by virtue of section 89 (1) of the Law of Property Act, 1925, although the sale to her was expressed to be subject to her equitable charge.

ACTION.

Mrs. Christine Agnes Rust (hereinafter called "the plaintiff") claimed possession of the first floor of 32, Gloucester Place, Portman Square, from Charles Sutton Goodale (hereinafter called "the defendant").

The facts are fully set out in the judgment.

P. Ingress Bell Q.C. and *W. T. Elverston* for the plaintiff.
 A lease granted without the consent of the mortgagee by a

mortgagor, whose statutory powers of leasing are excluded by the terms of the mortgage, is void against the mortgagee—Lord Selborne L.C. in *Corbett v. Plowden*¹ makes this clear, and his speech is cited by Evershed M.R. in *Dudley & District Benefit Building Society v. Emerson*.² The observations of Joyce J. in *Keith v. Gancia (R.) & Co. Ltd.*³ are to the same effect. [Reference was also made to *Coutts & Co. v. Somerville*⁴ and *Lever Finance Ltd. v. Needleman's Trustee*.⁵]

It is the plaintiff's case that under the assignment she became the absolute owner of the leasehold term and that she acquired all the rights of the first mortgagee to treat the defendant as a trespasser. A second mortgagee is entitled to purchase from a first mortgagee: *Shaw v. Bunny*⁶ and *Kirkwood v. Thompson*⁷: accordingly, although it is conceded that the second charge was extinguished on the assignment by virtue of section 89 (1) of the Law of Property Act, 1925, the first mortgagee had never waived his right to treat the defendant as a trespasser and this right passed to his successor in title: *Doe d. Downe (Lord) v. Thompson*.⁸

*Smith v. Widlake*⁹ provides a parallel to the present case: it was held there that where there is a void tenancy then, if there is a conveyance which purports to be made expressly subject to that void term, the vendor passes to the plaintiff his right to override the term of the void tenancy and the conveyance cannot be construed as confirming it. In *Davenport v. Smith*¹⁰ it was held that the plaintiff was precluded from relying on prior breaches of covenant of the lease since he took expressly with notice thereof, but that case is clearly distinguishable since there was initially a valid lease.

Even if Cunningham-Reid had accepted this tenancy the plaintiff has not accepted it since the conveyance which supersedes the contract was not expressed to be subject to the tenancy. Alternatively, although the second mortgage was extinguished under section 89 of the Law of Property Act, 1925, not all the plaintiff's rights thereunder, were lost: she retains, for example, the right to claim from Cunningham-Reid the surplus proceeds

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¹ (1884) 25 Ch.D. 678, 681.

² [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

³ [1904] 1 Ch. 774; 20 T.L.R. 330.

⁴ [1935] Ch. 438.

⁵ [1956] Ch. 375; [1956] 2 All E.R. 378.

⁶ (1865) 2 De G.J. & Sm. 468.

⁷ (1865) 2 De G.J. & Sm. 613.

⁸ (1847) 9 Q.B. 1037.

⁹ (1877) 3 C.P.D. 10.

¹⁰ [1921] 2 Ch. 270; 37 T.L.R. 909.

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of sale of the property after payment of his mortgage debt together with interest and his costs. Accordingly, it is submitted that her right as second mortgagee to treat the tenant as a trespasser still remains.

J. G. Strangman Q.C. and *Hector Hillaby* for the defendant. As between Wynne-Hughes, the mortgagor, and the defendant the tenancy became on February 15, 1954, a valid underlease under the doctrine of feeding the estoppel: *Mackley v. Nutting*.¹¹ It is conceded that at this date the first mortgagee and the plaintiff had the right to treat the defendant as a trespasser. On the assignment, the second mortgage and all the rights of the plaintiff thereunder were extinguished: section 89 (1) of the Law of Property Act, 1925. The first mortgage was also extinguished since it merged in the leasehold reversion acquired on the sale by the plaintiff; the tenant's right to redeem goes upon sale and accordingly the mortgagee's rights must also be extinguished. In *Doe d. Downe (Lord) v. Thompson*¹² the mortgagee had the whole legal estate in the land to convey, but in the present case under the law since 1925 the purchaser on sale by a mortgagee also receives the mortgagor's leasehold reversion and is accordingly bound by his disabilities: under a charge by way of legal mortgage, a mortgagee has the same powers and protection as under a mortgage by demise, and accordingly the purchaser acquired, as he would under a mortgage by demise, the mortgagor's leasehold reversion. *Smith v. Phillips*¹³ supports this contention. *Smith v. Widlake*¹⁴ is distinguishable from the present case since there the tenancy was wholly ineffectual. Further, even if the first mortgagee could upon sale have passed to the plaintiff his right to evict the defendant he did not do so. There was no express assignment of such right, and the contract was made "subject "to and with the benefit of" the underlease. Cunningham-Reid had notice of this underlease and the plaintiff as his successor in title is bound thereby: *Davenport v. Smith*.¹⁵

The defendant's underlease has priority over the plaintiff's legal title. Both Cunningham-Reid and the plaintiff had until the confirmatory legal charge in favour of Cunningham-Reid only equitable interests since the mortgagor had at the dates these 'charges were executed only an equitable estate. When the mortgagor acquired the legal estate, the defendant's underlease

¹¹ [1949] 2 K.B. 55; 65 T.L.R. 255; [1949] 1 All E.R. 413.

¹⁴ 3 C.P.D. 10.

¹² 9 Q.B. 1037.

¹⁵ [1921] 2 Ch. 270; 37 T.L.R. 909.

¹³ (1837) 1 Keen 694.

took effect as a legal term of years as between him and the mortgagor and, accordingly, since the defendant had no notice of any prior equities he takes priority over the plaintiff's title which rests upon the subsequent legal charge.

[HARMAN J. The second charge in favour of the plaintiff was registered and the defendant is, therefore, fixed with notice of both these charges.]

Hillaby following. Cunningham-Reid originally took an equitable mortgage and when the mortgagor acquired the legal estate this did not ipso facto convert the mortgagee's title into a legal one: a further deed was required to accomplish this. Cunningham-Reid, therefore, conveyed only under the further legal charge executed in his favour by the mortgagor and before this had been executed the defendant had acquired a legal estate in the land by reason of the doctrine of feeding the estoppel. The plaintiff's title, therefore, takes effect subject to the underlease.

Ingress Bell Q.C. in reply. The mortgagee's rights pass to a purchaser from him: there is clear authority that this is so in the case of foreclosure and the same rule must apply upon sale: *Towerson v. Jackson*.¹⁶ The plaintiff takes her title solely as successor of the first mortgagee: whatever may be the position under a mortgage by demise, under a legal charge the purchaser from the mortgagee acquires nothing from the mortgagor. The question of priorities must depend upon the nature of the underlease: since no legal estate is created between the mortgagee and the tenant under an unauthorized lease no question of priorities of legal estates between the plaintiff and defendant can arise. Farwell J. points out in *Iron Trades Employers Insurance Association v. Union Land and House Investors Ltd.*¹⁷ that a mortgagor cannot in any way bind his mortgagee when he grants an unauthorized lease. [Reference was also made to *Turner v. Cameron*¹⁸ and *Tarn v. Turner*.¹⁹]

July 27. HARMAN J. read the following judgment: The plaintiff is the leaseholder of 32, Gloucester Place, London, under a Portman Estate lease creating a term of 11 years from Christmas, 1951. In this action she seeks to eject the defendant from the first floor flat of the premises, of which he is in possession, and claims to be entitled so to remain by virtue of an underlease made between him and Robert Barry Wynne-Hughes for the

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¹⁶ [1891] 2 Q.B. 484, 487.¹⁸ (1870) L.R. 5 Q.B. 306.¹⁷ [1937] Ch. 313, 317; 53 T.L.R. 341; [1937] 1 All E.R. 481.¹⁹ (1888) 39 Ch.D. 456; 4 T.L.R. 375.

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residue of a term of eight years from January 22, 1954, at an annual rent of £5 and subject to certain onerous covenants said to be binding on the plaintiff as lessor.

The history of the matter is a little complicated and I must state it in some detail. In January, 1951, a certain Captain Cunningham-Reid, being then in possession of the property under a lease which would expire at Christmas, 1951, entered into an agreement with Lord Portman for the grant to him of a further lease on the terms on which the plaintiff now holds. The consideration was £3,000 and an annual rent of £120 payable quarterly on the usual quarter days. The agreement provided that the lease should be in the usual Portman form, and Cunningham-Reid covenanted not to assign or set over the benefit of the agreement to any person whomsoever; further, that he should do certain work upon the house and keep it as a private house.

In 1953 Cunningham-Reid obtained two written licences, the first to divide the property into a number of furnished service suites or bed-sitting rooms, and the second to assign the benefit of the agreement to Wynne-Hughes, which he did by a document under seal made on July 24, 1953, for a consideration of £3,000. On the same day Wynne-Hughes, having apparently paid £1,000 of the consideration, mortgaged all his estate and interest in the property to Cunningham-Reid to secure the balance of £2,000 made repayable by five equal yearly instalments. This document was expressed to be a charge by way of legal mortgage, but, in my opinion, could not convey or create any legal estate which the mortgagor had not. It operated therefore as an equitable charge. The very terms of section 87 of the Law of Property Act, 1925, which first gave legislative effect to charges by way of legal mortgage, make the section applicable only to legal mortgages of land. The section, therefore, has no application to cases where the mortgagor (as here) has only an equitable estate. Possibly the document operates as a covenant to create a legal mortgage, if and when the mortgagor acquires a legal estate: it excluded the mortgagor's statutory power of leasing in the following terms: "The borrower shall not be entitled to exercise
" any powers of leasing or accepting surrenders of leases given by
" any statute in that behalf except with the consent in writing of
" the lender Provided that such consent shall not be required for
" the letting of furnished suites of rooms or single rooms,"

In 1953 the plaintiff, under her then name of O'Callaghan, lent considerable sums to Wynne-Hughes in connexion with

repairs to and conversion of the property as shown by a document of March 7, 1953, styled "an investment contract" between the parties; and by a further charge of November 19, 1953, Wynne-Hughes charged the property to the plaintiff to secure £4,629 and interest subject to the first charge before recited. This instrument was also expressed to be by way of legal mortgage, but, of course, operated only in equity. It contained a provision for repayment by annual instalments of £1,000 and excluded the statutory powers of the borrower of leasing in the same terms as the first charge. It was registered at the Land Registry as a puisne mortgage on November 20, 1953.

It appears that Wynne-Hughes, even with the financial support of the plaintiff, was in need of money, for he, by the underlease of February 4, 1954, mentioned at the beginning of this judgment, sublet the first floor of the premises to the defendant for a term of eight years from January 22, 1954. The consideration was the sum of £2,260 paid on the execution of the document and an annual rent of £5. Certain furniture was expressed to be included in the letting and the landlord covenanted to pay rates, including water rates, to do certain repairs, and to maintain a constant supply of hot water.

It is quite clear, and was admitted at the bar, that this underlease when made was not within a mortgagor's statutory powers, even if this mortgagor had them, because it took a fine and did not reserve the best rent: see section 99 (6) of the Law of Property Act. This relieves me of considering whether this was a furnished suite of rooms within the proviso in that behalf in the two charges.

On February 15, 1954, a lease was granted to Wynne-Hughes in pursuance of the agreement of January 9, 1951, and in consideration of the repairs done by him and the £3,000 paid by his predecessor Cunningham-Reid.

Wynne-Hughes, having thus obtained the legal estate in a term of years sufficient to enable him to grant the underlease of February 4, 1954, was precluded from that date onwards as between himself and the defendant from denying that the defendant had a valid underlease. This, however, clearly did not affect either of the mortgagees, both of whom were entitled at this stage to treat the mortgagor as a trespasser and evict him. I cite again (as did Evershed M.R. in *Dudley and District Benefit Building Society v. Emerson*¹) Lord Selborne L.C.'s

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¹ [1949] Ch. 707; 65 T.L.R. 444; [1949] 2 All E.R. 252.

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speech in *Corbett v. Plowden*²: “ ‘If a mortgagor,’ says the Lord Chancellor, ‘left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them.’ ” It was said at the hearing that the defendant took his underlease without knowledge of the two mortgages. That would, I think, in any event be immaterial, but in law it is not correct, for, as the second charge was registered, he had notice of that and thus of the first charge also.

On August 28, 1954, Cunningham-Reid gave notice to Wynne-Hughes calling in the money under the first charge, and on September 22 his solicitors wrote to the defendant's solicitors alleging that the underlease was voidable against their client and asking for possession in order to avoid proceedings. At the same time they offered the defendant the opportunity to redeem the mortgage, as indeed he was entitled to do, as an alternative to going out of possession: see *Tarn v. Turner*.³ At the same time an offer was made to the plaintiff as second mortgagee to redeem the first mortgage, and, though this latter proposal was for a time entertained by her advisers, neither of these offers was accepted. Cunningham-Reid as first mortgagee was thus in a position to exercise his power of sale.

On November 12, 1954, the suggestion was made on the plaintiff's behalf that she should buy the property from the first mortgagee instead of redeeming, and a draft contract for sale was negotiated between the parties in the latter part of that year. On March 1, 1955, however, a Mme. Koumantarakis entered into a written contract to purchase from Cunningham-Reid as mortgagee for a sum of £3,000. This document contained the following special conditions: “G. The property is sold subject to and with the benefit of an underlease dated February 4, 1954, granted or purported to have been granted and made between the said Robert Barry Wynne-Hughes of the one part and Goodale of the other part and the purchaser or her solicitors having been supplied with a copy of the said underlease shall be deemed to purchase with full knowledge thereof

² (1884) 25 Ch.D. 678, 681.

³ (1888) 39 Ch.D. 456; 4 T.L.R. 375.

“ and shall raise no objection or requisition with regard thereto
 “ and the vendor gives no warranty as to the validity or otherwise
 “ of the said underlease. The counterpart of the said underlease
 “ is not and never has been in the possession custody or power
 “ of the vendor who shall not be required to hand the document
 “ over on completion. . . . K. The property is also sold subject
 “ to the existing legal charge dated November 19, 1953, made
 “ between the said Robert Barry Wynne-Hughes of the one part
 “ and C. A. O’Callaghan of the other part. L. This contract is
 “ conditional upon the vendor procuring the execution by the
 “ said Robert Barry Wynne-Hughes of a supplemental legal
 “ charge in the form annexed hereto prior to completion.”

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In the meanwhile the defendant’s solicitors were not unnaturally anxious as to his position, and it appears that, for reasons which are obscure, Cunningham-Reid’s solicitors informed them on the telephone on March 29, 1955, of the existence of condition G. which I have read.

The contract was completed on April 7, 1955, in favour of the plaintiff as sub-purchaser, and the completion statement shows that the sum due on the first mortgage was then about £2,200. On the previous day the vendor, in compliance with his obligations under the contract, obtained from Wynne-Hughes a legal charge expressed to be supplemental to the document of July 24, 1953, charging the property by way of legal mortgage to secure the money due under the 1953 deed. This gave Cunningham-Reid the equivalent of a legal estate in the term of years under the lease which he on the next day assigned to the plaintiff. This instrument recited the first charge and the deed of confirmation, and the vendor conveying as mortgagee assigned to the plaintiff the property for the residue of the term of the lease discharged from the first mortgage but expressed to be subject, nevertheless, to the legal charge mentioned in the second schedule, this being the plaintiff’s second charge.

On April 13, 1955, Cunningham-Reid’s solicitors wrote the following letter to the defendant’s solicitors: “ Dear Sir . . . The
 “ sub-sale to Mrs. Rust (formerly Mrs. O’Callaghan) was com-
 “ pleted on the 7th instant. Both the purchaser and the
 “ sub-purchaser are, of course, fully aware of the circumstances
 “ under which your client occupies part of the property and this
 “ was referred to in the contract of sale in the terms you mention.
 “ It was not, however, actually referred to in the assignment.”
 The word “ actually ” is perhaps a nice piece of irony.

On April 19, 1955, the defendant’s solicitors demanded of the

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plaintiff payment of the water rates under the underlease and also to reconnect the hot water supply and provide hot water. The retort to this was a claim for possession, to which the defendant's solicitors replied that the underlease was valid, and the present action was accordingly launched by writ dated June 14, 1955.

It is the defendant's case that the underlease, which was admittedly either void or voidable when first granted, has become binding on the plaintiff on the following grounds: (1) A mortgagee's right to treat as a trespasser a tenant of the mortgagor under a lease not authorized by the mortgage is a right only incident to the mortgage and intended to support the mortgagee's powers. So soon, therefore, as the mortgagee either sells or forecloses his mortgage this right is gone. (2) Even if the mortgagee could have passed his right against the defendant as the mortgagor's tenant to the plaintiff as purchaser, he did not do so, for there is no express assignment of that right in the instrument of April 7, 1955. Moreover, the contract of March 1, 1955, though not the assignment, is made expressly subject to the underlease. (3) Even if the mortgagee could and did pass whatever rights he had against the defendant to his purchaser, he had lost his right to object to the underlease before the assignment, and the plaintiff taking under him is in no better position than he. (4) The plaintiff's legal title rests only on the confirmatory deed of April 6, 1955. Up to that date the mortgagee for her vendor had no legal estate. The defendant, on the other hand, acquired a legal estate as against the mortgagor directly the lease of February 15, 1954, was executed in favour of Wynne-Hughes, this estate being created under the doctrine of feeding the estoppel. Therefore, the defendant, it is said, has the prior legal right and is ahead. (5) Notwithstanding the words in the assignment to her of April 7, 1955, the plaintiff's rights as second mortgagee disappeared as a result of that conveyance and no estate or interest under that instrument remains in her which would entitle her to object as second mortgagee to the underlease.

I will deal with these points in the order in which I have stated them.

(1) No authority for this proposition was produced and I am aware of none. There is, however, a case which appears to show that the contrary is right, namely, *Doe d. Downe (Lord) v. Thompson*,⁴ where the mortgagor created a lease in the defendant unauthorized by the mortgage. The plaintiff purchased the legal

⁴ (1847) 9 Q.B. 1037.

estate from the mortgagee (the mortgage being by conveyance of the fee) and also the equitable estate from persons deriving title under the mortgagor. He then received rent for two years from the tenant and subsequently sought ejectment against him, and was held entitled to possession on the ground that the estate of the lessee was never well created by the mortgagor, and that the plaintiff, having acquired the fee simple, could exercise the mortgagee's rights of treating the lessee as a yearly tenant only, although the mortgage had disappeared two years before. It is indeed true that if the mortgagor redeems, he will be bound by the lease which he himself has created—see *Smith v. Phillips* ⁵—but that doctrine has no application, in my judgment, to a sale or foreclosure by the mortgagee.

(2) I cannot see any necessity for an express assignment by the mortgagee of his rights against the mortgagor to the plaintiff as purchaser. It was not doubted that a second mortgagee may properly purchase from the first mortgagee and will obtain an irredeemable estate on so doing. Authority for this proposition is to be found in *Shaw v. Bunny* ⁶ and *Kirkwood v. Thompson*.⁷ If, then, the second mortgagee gets the same irredeemable estate as a stranger would get, he obtains all the rights of the mortgagee who conveys to him. In this case it is true that the contract of March 1, 1955, was expressed to be subject to the underlease, but, in my opinion, that only meant subject to the underlease so far as it had any validity, and may have been put there by way of precaution by the vendor. However that may be, the assignment is not expressed to be so subject, and it supersedes the contract, which, indeed, cannot be looked at for this purpose. A parallel is to be found in *Smith v. Widlake*,⁸ where the conveyance to the plaintiff was itself expressed to be subject to the term of a void tenancy. Nevertheless, it was held that the vendor passed to the plaintiff everything which he had, including his right to override the term. Bramwell L.J. says⁹: “It was also argued that, as the grant to the plaintiff was made expressly subject to the void lease, he is not entitled to possession until the expiration of the term intended to be created by the indenture dated September 29, 1834; but he, as grantee under the indenture dated April 2, 1874, takes all that his grantors could convey, and as the supposed term did not exist,

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⁵ (1837) 1 Keen 694.⁶ (1865) 2 De G.J. & Sm. 468.⁷ (1865) 2 De G.J. & Sm. 613.⁸ (1877) 3 C.P.D. 10.⁹ Ibid. 15.

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"he became seised in fee of the cottages and garden free from "incumbrances, and with the right to immediate possession." Cotton L.J. says this ¹⁰: "It has been argued that the plaintiff "cannot recover possession of the cottages and garden until the "expiration of 60 years from September 29, 1834, because "the conveyance to the plaintiff in the recitals, in the habendum, and in the covenant against incumbrances, recognizes as "valid the indenture of lease dated as of that day; and that the "deed must therefore be construed as confirming the void "lease or creating a new lease for the remainder of the term of "60 years. In support of this argument, reliance has been "placed upon *Prettyman's Case*.¹¹" After discussing that case he continues: "In my opinion that conveyance on its true construction refers to the lease of 1834, merely for the purpose "of excepting it from the covenant against incumbrances."

(3) The law on this subject is, in my opinion, correctly stated in Halsbury's Laws of England, 2nd ed., vol. 23, at p. 332, para. 495: "A lease granted by a mortgagor after a mortgage "without statutory or express power is good by estoppel between "mortgagor and lessee, but void as between mortgagee and "lessee," and in Joyce J.'s observation in *Keith v. Gancia (R.) & Co. Ltd.*¹² to the same effect. There has been here no acceptance of rent from the defendant by the plaintiff, nor, so far as I know, by Cunningham-Reid, but, even if there had been, it would not set up the underlease but would at the most create only a tenancy from year to year between the mortgagee and the tenant, and that not on the terms of the underlease. It is said that Cunningham-Reid had in some way waived his rights to object to the underlease. Now the facts as I have stated them show, first, that by the letter of September 22, 1954, he repudiated the underlease and gave the defendant a proper offer to redeem. Secondly, the defendant did not accept this offer and the mortgagee proceeded to negotiate for a sale. It is true that he contracted to sell subject to the underlease, but, so far as I know, he did not communicate this fact to the defendant until after the execution of the contract of March 1, 1955. The first assurance to the defendant seems to have been by telephone on March 30, 1955, and there was some confirmation in a letter of April 13, 1955. In my judgment Cunningham-Reid could not, after contracting with the plaintiff, deprive her of the subject-matter of the contract by making a

¹⁰ 3 C.P.D. 10, 16.¹¹ (1692) 2 Vern. 279.¹² [1904] 1 Ch. 774; 20 T.L.R. 330.

representation without her knowledge to a third party. But, apart from this, I am of opinion that Cunningham-Reid himself never waived his right to object to this underlease. All he said was, that if he succeeded in selling for enough money to cover himself he, for his part, would take no steps to evict the underlessee. In my opinion *Davenport v. Smith*,¹³ cited for the defendant, is clearly distinguishable. There the lease subject to which the plaintiff bought was a validly created lease, and he was held precluded from relying on prior breaches because he had notice of them before he bought and, in spite of this, recognized that the lease was valid. Accordingly, this point, in my view, fails.

(4) This is a highly technical point. It is said that the defendant acquired a legal estate in 1954, and the plaintiff no legal title until 1955, but, in my judgment, as between the mortgagee and the tenant under an unauthorized lease, no legal estate is created at all. The mortgagor must be taken to have been exercising his right to make a lease good only as between himself and the tenant, as pointed out by Farwell J. in *Iron Trades Employers Insurance Association v. Union Land and House Investors Ltd.*¹⁴ Dealing with the old law he said: "Under the law as it was before the Act of 1881 the position was this, that in the case of a legal mortgage the mortgagor, although in possession, had no power at all to grant a lease which was binding on the mortgagee. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment. So far as the mortgagor, who had granted the lease, was concerned, it was binding upon him as against the lessee, and he was estopped from disputing it, and as against the mortgagor or against anyone other than a person having a title paramount to the mortgagor, e.g., the mortgagee, such a lease was good and the lessee was entitled to the benefit conferred thereby, but so far as the mortgagee was concerned the lessee had no estate or interest as against him, except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession of the property which had been leased to him by the mortgagor, but beyond that right to redeem he had no rights as against the mortgagee nor had he any estate or interest as against the mortgagee in the land at

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¹³ [1921] 2 Ch. 270; 37 T.L.R. 909.

¹⁴ [1937] Ch. 313, 317; 53 T.L.R. 341; [1937] 1 All E.R. 481.

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“ all; he had by virtue of equity a right to redeem if he was in danger of being evicted by the mortgagee who had, as I have said, a paramount title, but except to that extent a lease granted by the mortgagor prior to the Act of 1881 was ineffective as against the mortgagee.” He then discusses whether the law has been altered except to the extent to which statutory powers of leasing have been created by the Act of 1881, and indeed 1925, in favour of mortgagors, and came to the conclusion that the position was otherwise the same. The mortgagor therefore was not dealing with a legal term of years vested in him under the Law of Property Act, 1925, but only with his equity of redemption. In this I agree with the observations in Woodfall, 24th ed., at pp. 80 to 81. I am, therefore, of opinion that no question of priority of legal estates arises.

A further technical point was taken that a sale by a mortgagee under the Act of 1925 conveys to the purchaser not only the mortgagee's term of years but the mortgagor's expectancy thereon, and, therefore, the purchaser acquiring the mortgagor's as well as the mortgagee's estate is bound by the mortgagor's disabilities. In support of this proposition there was cited *Doe d. Downe (Lord) v. Thompson*,¹⁵ already referred to, where Lord Denman C.J. said: “ The lease was good against Thomas Burton by estoppel only: he had not the legal estate when he granted it; nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption; and they could pass nothing else to Lord Downe. The legal interest has passed to Lord Downe wholly and entirely from Messrs. Swann, who were not privies to, nor in any way estopped by, the lease; neither can Lord Downe be estopped in respect of the interest which he took from them. Doubtless, if Lord Downe had taken the legal interest from Burton, he would have been estopped in the same manner that Burton would, as was held in *Trevivan v. Lawrance*,¹⁶ and other cases; and particularly see the case of *Right d. Jefferys v. Bucknell*,¹⁷ in which the doctrine of estoppel was fully considered. But, as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them. And, as those from whom he did take the land were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. Swann alone conveyed.” In my

¹⁵ 9 Q.B. 1037, 1043.

¹⁷ (1831) 2 B. & Ad. 278.

¹⁶ (1704) 1 Salk. 276.

opinion there is nothing in this point. Nothing passed to the purchaser from the mortgagor; all passed from the mortgagee under his statutory power of sale. Moreover, this being a charge by way of legal mortgage, in fact no term was vested in the mortgagee; he merely had the same powers as if it had been so vested, and therefore the point cannot, in my judgment, arise (see section 87 of the Law of Property Act, 1925).

(5) On this point it seems to me that the defendant is right. The assignment by the first mortgagee by virtue of his power has the effect, under section 89 of the Law of Property Act, not only of conveying to the purchaser the mortgage term, but also, as appears in section 89 (1) (a), as follows: "the conveyance . . . shall operate to convey to the purchaser not only the mortgage term, if any, but also (unless expressly excepted with the leave of the court) the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority [to that]." Therefore, the plaintiff's reversion as second mortgagee was destroyed. If, then, the plaintiff had no rights as successor to the first mortgagee, she could not, in my judgment, succeed in this action under rights as second mortgagee, notwithstanding the fact that the assignment was expressed to operate subject to the second mortgage. As, however, in my judgment, the plaintiff succeeds as successor to the first mortgagee, this point does not avail the defendant.

Lastly, by re-amendment the defendant alleged an estoppel precluding the plaintiff from relying on her rights. This arose, it was argued, first, from the form of the contract; secondly, the letter from Cunningham-Reid already mentioned; thirdly, from the fact that both Cunningham-Reid and the plaintiff knew of the underlease before the contract and took no steps to avoid it, and, lastly, because the defendant in these circumstances had taken no steps to redeem and had thus lost his right of redemption. There was no allegation that he refrained from redeeming in reliance on any representation. Even if there were, there seem to be two answers; first, that the defendant was given ample opportunity to redeem as I have already described, and, secondly, any comforting assurances by Cunningham-Reid were made without the knowledge of the plaintiff and after contract in her favour, and cannot bind her.

It follows, in my judgment, that the plaintiff is entitled to the order for possession which she seeks.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade; Cecil Jobson.*

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Infant—Custody—Illegitimate child—Application by putative father for custody order—Whether jurisdiction to entertain application—“Father”—Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 5—Guardianship of Infants Act, 1925 (15 & 16 Geo. 5, c. 45), s. 3—Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 16.

The admitted father of two illegitimate children applied under the Guardianship of Infants Act, 1886, s. 5¹ (as amended), to justices for an order granting him custody of the children, and they dismissed the application on the merits, whereupon the father appealed:—

Held, that, *prima facie*, the titles of “mother” and “father” belonged only to those who had become so in the manner known to and approved by the law, and that meaning of such terms in a statute was not to be departed from unless a compelling reason

¹ Guardianship of Infants Act, 1886, s. 5: “The court may, upon “the application of the mother of “any infant (who may apply with- “out next friend), make such order “as it may think fit regarding the “custody of such infant and the right “of access thereto of either parent, “having regard to the welfare of the “infant, and to the conduct of the “parents, and to the wishes as well “of the mother as of the father, and “may alter, vary, or discharge such “order on the application of either “parent, or, after the death of either “parent, of any guardian under this “Act, and in every case may make “such order respecting the costs of “the matter and the liability of the “father for the same or otherwise as “to costs as it may think just.”

Guardianship of Infants Act, 1925, s. 3: “(1) The power of the court “under section five of the Guardian- “ship of Infants Act, 1886, to make “an order as to the custody of an “infant and the right of access “thereto may be exercised notwith- “standing that the mother of the “infant is residing with the father “of the infant. (2) Where the court “under the said section as so “amended makes an order giving the “custody of the infant to the mother, “then, whether or not the mother is

“then residing with the father, the “court may further order that the “father shall pay to the mother “towards the maintenance of the “infant such weekly or other “periodical sum as the court, having “regard to the means of the father, “may think reasonable. (3) No such “order, whether for custody or main- “tenance, shall be enforceable and “no liability thereunder shall accrue “while the mother resides with the “father, and any such order shall “cease to have effect if for a period “of three months after it is made the “mother of the infant continues to “reside with the father. (4) Any “order so made may, on the applica- “tion either of the father or the “mother of the infant, be varied or “discharged by a subsequent order.”

Administration of Justice Act, 1928, s. 16: “The powers of a court under “section five of the Guardianship of “Infants Act, 1886, as amended by “the Guardianship of Infants Act, “1925, to make orders regarding the “custody of an infant and the right “of access thereto of either parent, “may be exercised upon the applica- “tion of the father of an infant in “like manner as these powers may “be exercised upon the application “of the mother of the infant.”

could be found in the statute for so doing; that nowhere in the Act of 1886 (as amended) was there any compelling reason for extending the term "father" from a *de jure* to a putative one; that, further, there were compelling reasons for giving that term its *prima facie* meaning throughout the Acts of 1886 and 1925; that, accordingly, the word "father" in section 16 of the Administration of Justice Act, 1928 (amending section 5 of the Act of 1886), must be construed as meaning legitimate father and did not extend to a putative one; and that neither the justices nor the judge had jurisdiction to make the order sought.

Dicta of Viscount Simonds in *Galloway v. Galloway* [1956] A.C. 299; [1955] 3 All E.R. 429 and of Denning L.J. in *In re M. (an infant)* [1955] 2 Q.B. 479; [1955] 2 All E.R. 911 applied.

In re E. (an infant) [1956] Ch. 23; [1955] 3 All E.R. 174 followed.

Semble, neither does section 5 of the Act of 1886 (as amended) apply to the mother of an illegitimate child.

In re A., A. v. S. (1940) 164 L.T. 230; 56 T.L.R. 934 distinguished.

APPEAL from justices.

The putative father of two illegitimate children took out a summons under the Guardianship of Infants Acts, 1886 and 1925, before the justices in which he asked for custody of the children. The justices rejected a submission that they had no jurisdiction, and they decided against the father on the merits. The father appealed and, on the hearing of the appeal, counsel for the mother took the preliminary objection that the justices had no jurisdiction, and that the judge hearing appeals from them had no jurisdiction, to entertain any application by a putative father for custody under the Guardianship of Infants Acts, 1886 and 1925.

James Comyn for the mother. A putative father is not within the ambit of the Guardianship of Infants Acts, 1886 and 1925. Accordingly, there is no jurisdiction to make the order sought. It is plain, in the light of the relevant statutory provisions and the authorities, that "father" in section 16 of the Administration of Justice Act, 1928, which section extends section 5 of the Guardianship of Infants Act, 1886, as amended by section 3 of the Act of 1925, must be confined to lawful father.

The purpose of section 5 of the Act of 1886 was to enable the mother of a legitimate child to obtain custody of it, as against the father, without making it a ward of court. Section 7 envisages parents who are lawfully married. [Sections 1, 9 and 13 of the Act of 1886 were also referred to.]

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As to the Act of 1925, "claim" in section 1 is quite general and means "claim on the merits." It is to be noted that the words "common law" are attached to the word "father" and not mother; the section, in referring to the common law rights of the father, is plainly contemplating a lawful father. It is true that in *In re A.*² Bennett J. held that the word "mother" in section 5 (2) included an unmarried mother, and therefore it might be argued that the word "father" in section 5 (1) included a natural father. But such words as "mother," "father," "parent," "child" when found in a statute are to be construed as meaning "lawful father," "lawful mother," "lawful parent," "legitimate child" unless there is a compelling reason for extending the ambit of those terms: see, generally, *Galloway v. Galloway*³; *In re M. (an infant)*⁴; *In re Makein*.⁵ In section 5 (2) of the Act of 1925 there was a compelling reason for construing the subsection so as to include an unmarried mother, for in the Schedule to the Act, which relates to consents to marriage, there is a reference to the guardian of an illegitimate child appointed by the mother, and the only means by which she can appoint such a guardian is under that subsection. But there is no compelling reason to construe subsection (1) of section 5 so as to include a natural father. [Reference was also made to sections 2, 3, 4, 7, 9 and 11 of the Act of 1925.]

If the applicant's contention be right and "mother" and "father" in the Act of 1925, and in particular in section 3, include *de facto* parents, it would follow that an unmarried mother, by bringing proceedings under section 5 of the Act of 1886, as amended by section 3 of the Act of 1925, could obtain maintenance against the putative father without complying with the strict requirements of the Bastardy Acts. There are four restrictions imposed by the Bastardy Acts in the case of putative fathers and none of them appear in section 3 of the Act of 1925. They are as follows: Only a single woman, as defined by the Bastardy Acts and judicial interpretation thereon, can obtain an order for maintenance in respect of an illegitimate child. Secondly, the application for an affiliation order and consequential maintenance is limited in point of time. Thirdly, in affiliation proceedings the evidence of the mother as to the paternity of the child is essential, and must be corroborated in some material particular even in the face of an admission of paternity. Lastly,

² (1940) 164 L.T. 230; 56 T.L.R. 934.

⁴ [1955] 2 Q.B. 479.

⁵ [1955] Ch. 194.

³ [1956] A.C. 299.

an appeal lies, not to the High Court, but to quarter sessions: see Halsbury's Laws of England, 3rd ed., vol. 3, pp. 110, 114, 120, 122. In view of the above it can scarcely be suggested that the Guardianship of Infants Acts extend to illegitimate children, for none of the aforementioned limitations apply to those Acts. [Reference was also made to sections 3 and 4 of the Bastardy Laws Amendment Act, 1872; sections 50 and 59 of the Children Act, 1948; the Guardianship and Maintenance of Infants Act, 1951; section 1 of the Affiliation Orders Act, 1952; *Barnardo v. McHugh*⁶; *In re Carroll (J. M.)*⁷; Halsbury's Laws of England, 3rd ed., vol. 3, pp. 106 to 110; article entitled "Custody of "Illegitimate Children," (1956) 106 Law Journal, 439, 440.]

Brian Clapham for the father. This case requires consideration of the words "infant" and "father." "Infant" is a neutral term and embraces both a legitimate and an illegitimate infant. Under section 5 of the Act of 1886 it was only the mother who could make an application for custody; even the father of a legitimate child could not make an application. But in 1886 it was unnecessary to refer to the father because the father of a legitimate child had a common law right to custody of it, subject to the general jurisdiction of the Chancery Division of the High Court. Accordingly, when section 16 of the Administration of Justice Act, 1928, empowered the "father of an infant" to apply under section 5 of the Act of 1886, as amended by section 3 of the Act of 1925, it is a fair inference from the words of the section that its ambit includes an application by the father of an illegitimate infant.

Strong reliance is placed on the decision of *Bennett J.* in *In re A.*,⁸ for if "mother" in section 5 (2) of the Act of 1925 includes an unmarried mother, one would expect "father" to include a natural father in subsection (1) of that section. If, however, it be contended that "mother" must be given a different connotation in different parts of that Act or in the other relevant Acts, then it follows with equal force that "father" can be interpreted differently in different parts of that Act or in the other relevant Acts. It therefore by no means follows that because "father" in a certain context must be construed as limited to "lawful father," it must be given that connotation throughout the Acts. Accordingly, it is submitted that in section 1 of the Act of 1925 "father" and "mother" include

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⁶ [1891] A.C. 388, 395, 396, 398,
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⁷ [1931] 1 K.B. 317; 47 T.L.R.
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⁸ 164 L.T. 230.

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the parents of legitimate or illegitimate children, except where the section refers to the "common law" rights of the "father."

It has been suggested that if the above contentions be correct a conflict with the Bastardy Acts would arise. But there would be no conflict, for in bastardy proceedings the question for determination is the paternity of the child, while under the Guardianship of Infants Acts the questions relate to custody, guardianship and marriage.

By virtue of section 16 of the Act of 1928 the court has jurisdiction to make the order sought. That this is the first case which has raised the question cannot affect the issue. In this connexion reliance is placed on the observations of Denning L.J. in *Packer v. Packer*⁹: "What is the argument on the other side? "Only this, that no case has been found in which it has been "done before. That argument does not appeal to me in the "least. If we never do anything which has not been done before, "we shall never get anywhere. The law will stand still whilst "the rest of the world goes on; and that will be bad for both." [Reference was also made to *Sleeman v. Wilson*¹⁰; *Rex v. De Manneville*¹¹; *Rex v. Moseley*¹²; *Rex v. Soper*¹³; *Horner v. Horner*¹⁴; *Barnardo v. McHugh*¹⁵; *In re Aster (an infant)*¹⁶; *Galloway v. Galloway*.¹⁷]

Comyn replied.

ROXBURGH J. The appellant is the putative father of two illegitimate children. It is admitted that he is the de facto natural father and that the unmarried respondent is the mother. He took out a summons under the Guardianship of Infants Acts of 1886 and 1925 before the justices asking for custody of the two children of the union. The justices rejected a submission that they had no jurisdiction and decided against the appellant on the merits, or demerits, of his case. He appeals, and counsel for the respondent mother—that is to say, the de facto mother—took the preliminary objection that the justices had no jurisdiction and that I, hearing appeals from them, have no jurisdiction to entertain any application by a putative father for custody under those Acts.

This question, which is difficult and also of general importance to the legal profession, was fully argued. When I realized that

⁹ [1954] P. 15, 22; [1953] 2 All E.R. 127.

¹⁰ (1871) L.R. 13 Eq. 36.

¹¹ (1804) 5 East 221.

¹² (1798) 5 East 224n.

¹³ (1793) 5 Term Rep. 278.

¹⁴ (1799) 1 Hag.Con. 337, 351, 352.

¹⁵ [1891] A.C. 388, 397.

¹⁶ [1955] 1 W.L.R. 465.

¹⁷ [1956] A.C. 299, 312.

I had two litigants of small means before me, and that their legal aid had apparently come to an end, I decided to hear the case *de bene esse* on its merits, and I am glad that I did so, because I can say at once that if the justices had jurisdiction they came to a right conclusion; indeed, this is so clear on the evidence that I do not feel it is necessary to say more than that if I ought not to dismiss the appeal for want of jurisdiction I ought to dismiss it for its demerits.

But the question of jurisdiction is indeed puzzling. Before 1886 the mother of a legitimate child had no means of obtaining custody of it against the father except by making it a ward in Chancery and, accordingly, section 5 of the Guardianship of Infants Act, 1886, was passed which provided and, subject to amendment, still provides: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father," and I do not think I need read any more of that provision. It is to be observed that that section, as it stands in the Act of 1886, is limited to the mother and does not make any provision for awarding any maintenance.

The position before 1886 was quite different in the case of an illegitimate child. I quote from the judgment of Sir William Scott in *Horner v. Horner*¹: "Now, on all general principles, it is perfectly clear that the only father whom the law of the country has armed with the *patria potestas* is the father 'quem nuptiae demonstrant.' He only is the guardian of his child by law, and he only may delegate that trust to another at his death. The only cases in which the natural parent is acknowledged are cases to his disadvantage, in cases of civil concern, or by way of restriction, in such as are of a moral nature. He is compelled by later statutes to maintain the child, for the relief of the parish, to ease it of the charge to which it is primarily liable, because before these statutes the parish alone was bound to maintain it. It is laid down in 2 Bulstrode, 344, and Bott, 460, that before the statute of the 18 Eliz. c. 3, the parish where the child was born must maintain it till it gained a settlement. The custody of the child, therefore, must have been at that time in the hands of the parish, he was *filius populi*, and there was no ground upon

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¹ (1799) 1 Hag.Con. 337, 351, 352.

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“ which the possession of the child could have been assumed by the father. Even since the enactment of that statute it continued for some time a matter of no inconsiderable doubt whether the parent had a right to take the child out of the possession of the parish.”

After some passages discussing that question, Sir William Scott continued: “ Though this may now be settled, still he can appoint no guardian;”—“ he ” being the natural father, the putative father—“ and, I presume, that he cannot legally take the child out of the custody of the mother, in which it is deposited by nature at its birth; though I speak with all necessary caution on a point belonging to the learning of another profession. All this is sufficient to show that he has the principal burden of maintenance, with a very small degree (if any) of parental authority.”

To this passage extracted from a judgment pronounced in 1799 I propose to add a passage from the speech of Lord Herschell in *Barnado v. McHugh*²: “ The question principally discussed at your Lordships’ Bar was whether the mother of an illegitimate child has a legal right to its custody. It was contended on behalf of the appellant that she has no such right; whilst on the other side it was argued that her rights are the same as those which a father possesses with regard to his legitimate children. In the courts below the latter proposition appears to have been considered to be established by the authorities. I do not feel satisfied that the authorities do establish that proposition.” Then, after discussing the authorities, Lord Herschell continues³: “ It seems to me that there was in former times a disposition to carry out rigorously to its logical conclusion the doctrine that an illegitimate child was *filius nullius*, and to hold that no one possessed in relation to it the full parental rights which the law recognizes in the case of legitimate offspring. When Maule J., in the case of *In re Lloyd*,⁴ asked, ‘ How does the mother of an illegitimate child differ from a stranger? ’ it does not appear to me that he was speaking ironically, but rather stating bluntly this legal doctrine. But whatever may have been the view in former times, I cannot but think that the legislation embodied in the Poor Law Act (4 & 5 Will. 4, c. 76, s. 71) renders it impossible in the present day”—that is, of course, 1891—“ to regard the mother of an illegitimate child as destitute of any rights in

² [1891] A.C. 388, 396; 7 T.L.R. 726.

³ [1891] A.C. 388, 398.

⁴ (1841) 3 Man. & G. 547, 548.

“relation to its custody. The obligation cast upon the mother
 “of an illegitimate child to maintain it till it attains the age of
 “sixteen appears to me to involve a right to its custody. It is,
 “however, no longer important to inquire what are the rights
 “of the mother in relation to an illegitimate child at common
 “law. All the courts are now governed by equitable rules, and
 “empowered to exercise equitable jurisdiction. As was said by
 “Sir George Jessel, M.R., in *Regina v. Nash*⁵: ‘In equity
 “‘regard was always had to the mother, putative father, and
 “‘relations on the mother’s side.’” Commenting on that
 decision Lord Herschell said⁶: “I think this case determines
 “(and I concur in the decision) that the desire of the mother of
 “an illegitimate child as to its custody is primarily to be
 “considered. Of course, if it can be shown that it would be
 “detrimental to the interest of the child that it should be
 “delivered to the custody of the mother or of any person in
 “whose custody she desires it to be, the court, exercising its
 “jurisdiction, as it always does in such a case, with a view to the
 “benefit of the child, would not feel bound to accede to the
 “wishes of the mother.” *Barnardo v. McHugh*⁷ was decided
 some considerable time after the passing of the Guardianship of
 Infants Act, 1886, and it is worth noting in passing that there is
 no suggestion that it applies to the position of illegitimate
 children.

Next, I will refer to the dictum of Cockburn C.J. in *The Queen v. Inhabitants of Brighton*⁸ where he in the course of the argument interjected: “The father of an illegitimate child is
 “not recognized by the law of England as to civil purposes;
 “but in that it differs from the law of other countries.” That
 was the position in 1886. The father of a legitimate child
 required no further fortification of his legal rights, the mother
 of an illegitimate child required no further fortification of her
 position; what she might require was maintenance for her illegitimate
 child, and that, at any rate until 1925, she could only
 get by bastardy proceedings. I will read a short passage from
 Halsbury’s Laws of England, 3rd ed., vol. 3, p. 108: “The
 “father of an illegitimate child, so long as the child remains
 “illegitimate, is not generally recognized by the law of England
 “for civil purposes. He is under no obligation to provide for
 “the child, in the absence of any affiliation order.” This is, of
 course, a statement of the law as it is understood by the editors

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⁵ (1883) 10 Q.B.D. 454.⁷ [1891] A.C. 388.⁶ [1891] A.C. 388, 399.⁸ (1861) 1 B. & S. 447, 451.

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of Halsbury to be today and impliedly adopts the view to which this judgment is now tending. "He is under no obligation to provide for the child, in the absence of any affiliation order, unless he has adopted it de facto, or obtained an adoption order." A little later occurs the statement: "The father may also be compelled to contribute to the support of the child by affiliation proceedings instituted by the mother."

I take it that, *prima facie*, the titles of "father" and "mother" belong only to those who have become so in the manner known to and approved by the law. In *Galloway v. Galloway*⁹ Viscount Simonds said: "First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament that 'child' *prima facie* means lawful child and 'parent' lawful parent. The common law of England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as 'filius nullius.' This *prima facie* meaning may in certain circumstances be displaced and a wider meaning given to the words." That passage was from a minority speech in that case in which the words under consideration were quite different. The words under consideration were "the children the marriage of whose parents is the subject of the proceedings," and though by a majority of three to two the House of Lords decided that the *prima facie* meaning in that case had been displaced, I do not think that any of their Lordships doubted that that was the *prima facie* meaning of the words "child" and "parent," and I think that the same reasoning must, and does, apply to "father" and "mother." Moreover, not only is it true to say that there is nothing in the Act of 1886, or in the circumstances in which it was passed, to suggest that these titles were extended to de facto parents, but it is true to say, I think, that there is a good deal to the contrary.

I will read sections 2 and 3 of the Act of 1886. These sections, which have been repealed on the substitution of provisions more favourable to the mother by a later Act, clearly recognize the paramount position of a father as it then was and are inappropriate to the position of a father who was but a putative father. The repealed provisions to which I referred read as follows. Section 2: "On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act then from and after the passing of this Act, the mother if surviving shall be the guardian of such

⁹ [1956] A.C. 299, 310; [1955] 3 All E.R. 429.

“infant, either alone when no guardian has been appointed by
 “the father, or jointly with any guardian appointed by the
 “father. When no guardian has been appointed by the father,
 “or if the guardian or guardians appointed by the father is or
 “are dead, or refuses or refuse to act, the court may, if it shall
 “think fit, from time to time appoint a guardian or guardians to
 “act jointly with the mother.”

Then section 3: “(1) The mother of any infant”—and I stress this because of what is coming hereafter—“may by deed
 “or will appoint any person or persons to be guardian or
 “guardians of such infant after the death of herself and the
 “father of such infant (if such infant be then unmarried), and
 “where guardians are appointed by both parents they shall act
 “jointly. (2) The mother of any infant may by deed or will
 “provisionally nominate some fit person or persons to act as
 “guardian or guardians of such infant after her death jointly
 “with the father of such infant, and the court, after her death,
 “if it be shown to the satisfaction of the court that the father
 “is for any reason unfitted to be the sole guardian of his children,
 “may confirm the appointment of such guardian or guardians
 “who shall thereupon be authorized and empowered so to act
 “as aforesaid, or make such other order in respect of the
 “guardianship as the court shall think right.” It seems to me quite plain that when that section was in force this Act could not have applied to illegitimate children at all. As I have already said, it is not now in force, but it seems to me quite clear that in that Act “father” and “mother” mean father and mother *de jure*.

The difficulties, which cannot be entirely overcome by judicial decision whatever view is adopted, spring from piecemeal amendments by the Guardianship of Infants Act, 1925, and the Administration of Justice Act, 1928. The Act of 1925, which, except so far as it amended the law relating to the marriage of infants (and those provisions have since been repealed) has to be construed as one with the Act of 1886, provides, by section 1, as follows: “Where in any proceeding before any court (whether
 “or not a court within the meaning of the Guardianship of
 “Infants Act, 1886) the custody or upbringing of an infant, or
 “the administration of any property belonging to or held on
 “trust for an infant, or the application of the income thereof,
 “is in question, the court, in deciding that question, shall regard
 “the welfare of the infant as the first and paramount considera-
 “tion, and shall not take into consideration whether from any

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“ other point of view the claim of the father, or any right at
 “ common law possessed by the father, in respect of such
 “ custody, upbringing, administration or application is superior
 “ to that of the mother, or the claim of the mother is superior
 “ to that of the father.”

Section 2 of the Act of 1925 provides: “ The mother of an
 “ infant shall have the like powers to apply to the court in
 “ respect of any matter affecting the infant as are possessed
 “ by the father.” It is curious that, notwithstanding the
 equalization as between parents effected by section 1, no power
 is there given to the father to apply for custody.

Now comes section 3, with which the difficulties begin. Here,
 for the first time, the mother is given the right to apply for
 maintenance, and if in this case the terms “ father ” and
 “ mother ” include de facto parents, the mother, by initiating
 proceedings under section 5 of the Act of 1886, as amended by
 section 3 of the Act of 1925, could obtain maintenance against
 the putative father without regard to the restrictions imposed
 by the Bastardy Acts. Section 3 of the Act of 1925 reads as
 follows: “ (1) The power of the court under section five of the
 “ Guardianship of Infants Act, 1886, to make an order as to the
 “ custody of an infant and the right of access thereto may be
 “ exercised notwithstanding that the mother of the infant is then
 “ residing with the father of the infant.” It is not on that sub-
 section that the point arises, but that must be read in order to
 understand the important subsection, subsection (2): “ Where
 “ the court under the said section as so amended makes an order
 “ giving the custody of the infant to the mother, then, whether
 “ or not the mother is then residing with the father, the court
 “ may further order that the father shall pay to the mother
 “ towards the maintenance of the infant such weekly or other
 “ periodical sum as the court, having regard to the means of the
 “ father, may think reasonable.”

The restrictions imposed by the Bastardy Acts in the case of
 putative fathers are four in number and are important, and none
 of them appear in that section. In order to shorten this judg-
 ment, I propose to read a summary of this matter from
 Halsbury's Laws of England, 3rd ed., vol. 3, p. 110, para. 172:
 “ A single woman who has a bastard child may take proceedings
 “ for an affiliation order, but a woman may not obtain an order
 “ where she has married before she makes her application for a
 “ summons, whether she is living with her husband or not. Case
 “ law has so extended the meaning of the expression ‘ single

“ ‘ woman ’ that a widow, or a married woman who has a bastard child while she is married can take proceedings, but it must be shown that the child is in fact a bastard, and that she is living separate from her husband.” For the purpose of this judgment the precise extent of that restriction is immaterial. What is quite obvious is that there is a restriction and it is not every woman who is the mother of an illegitimate child who can make an application for an affiliation order.

Then at p. 114: “ An application ”—that is, for an affiliation order—“ may be made either at any time before the birth, in which case the complaint must be substantiated on oath, or at any time within twelve months from the birth. If the putative father has ceased to reside in England before the birth, or within twelve months after, the application may be made within twelve months after his return. After the expiry of the above periods no application by the mother can be made except where the putative father has, within the twelve months after the child’s birth, paid money for the child’s maintenance, or where the mother proves that before the birth she was a party to a marriage which was invalid by reason of either party being under age, and that the other party thereto had access to her within twelve months before the birth of the child; in these cases the mother may make her application at any time.” Here again the importance is not the precise extent of the restrictions, which are immaterial for the present case, but the fact that the time at which the application is to be made is not unlimited.

Then again, p. 120: “ The evidence of the mother as to the paternity of the child is essential, and must be heard notwithstanding any consent or admission on the part of the defendant ”; and that is very important. There is nothing whatever in the Guardianship of Infants Act to suggest that the court may not act on an admission of the putative father. That is the third important restriction.

At p. 122 occurs a passage which does not concern a restriction, but is relevant: “ Section 188. The court may, at the hearing, adjudge the defendant to be the putative father of the child ”; that is to say, that decision by the court on that evidence is a condition precedent to any order for the payment of any sum. Then the passage continues: “ and if it sees fit, having regard to all the circumstances of the case, may make an order on him ”—that is the putative father—“ for the payment in favour of the mother or other person or body in whose favour

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" the order is made of a weekly sum, not exceeding 30s., for the
" maintenance and education of the child . . . "

Then, the last passage I need read on this point is on p. 134 :
" An appeal lies to quarter sessions from an order made in
" affiliation proceedings, or from a refusal by the court to make
" such an order, or from the revocation, revival, or variation of
" such an order."

Therefore, to summarize the difficulties, they are shortly as follows: Under the Bastardy Acts only a single woman, as defined either by the Acts or by judicial interpretation, can obtain an order for maintenance in respect of an illegitimate child—there is no limitation at all of that sort in the Guardianship of Infants Acts. Secondly, the application for an affiliation order and consequential maintenance has to be made during a period which is limited—there is no limitation in the Guardianship of Infants Acts. Thirdly, evidence of paternity has to be corroborated even in the face of admission—there is nothing of that sort in the Guardianship of Infants Acts. Lastly (and this, perhaps, is the least important), an appeal lies, not to the High Court as under the Guardianship of Infants Acts, but to quarter sessions. It is, therefore, almost impossible to believe that the Guardianship of Infants Acts were intended to embrace illegitimate children.

In his dissenting speech in *Galloway v. Galloway*¹⁰ Lord Simonds referred to these considerations: " Let me remind your
" Lordships that the putative father of an illegitimate child had
" no rights whatever in regard to it: nor—and this is of great
" importance—had he, as between himself and the mother, any
" obligations or liabilities in respect of it, unless she, within a
" short period of time and by evidence that required corrobora-
" tion, established that he was the father and obtained an order
" against him. Is all this to be changed? Is the mother to have
" less than her former rights to the custody of her natural child?
" Is the man whom she has married and alleges to be its father
" to be subject to new liabilities? Is he, when the years have
" passed and he has by his generous treatment of the mother's
" illegitimate child as his own lent colour to the allegation of
" his paternity, to be the victim of claims which he cannot then
" disprove?" Though I am conscious that I am quoting from a minority speech, I adopt this reasoning in a quite different context, in which, if I may respectfully say so, it is even more cogent than in the context in which those words were originally pronounced.

¹⁰ [1956] A.C. 299, 312.

I now come to sections 4 and 5 of the Act of 1925, which are substituted for sections 2 and 3 of the Act of 1886 and are more favourable to the mother than the corresponding repealed sections. Yet even these provisions seem to assume that, if the father is alive, no guardian would be absolutely necessary and that the mother cannot escape from joint guardianship after her death. This equalizing process would be in accordance with modern developments in the case of a lawful father, but would be very strange in the case of a putative father whose identity might be neither ascertained nor ascertainable. Moreover, it would be very inconvenient if a putative father could appoint a guardian under section 5, because the validity of the appointment in such a case might well depend upon an investigation after his death of a disputed allegation of paternity.

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Section 4, to which I have referred, provides as follows:

“(1) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the mother. (2) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.” Then there follows a new subsection (2) (a), which is immaterial to the present question.

Section 5 is important: “(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death. (2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death. (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting.” Then follow provisions if the mother or father shall object. Then subsection (5) provides: “Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.”

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It has been held in the case of *In re A.*¹¹ that the word “mother” in subsection (2) of section 5 does include an unmarried mother, and it has been so held for a very convincing reason, namely, that in the Schedule to the Act of 1925, which related to consents to marriage, reference was made to the guardian of an illegitimate child appointed by the mother, and there is no way in which she could appoint such a guardian except under that subsection. Although the Schedule to the Act of 1925 has been repealed, it is replaced by a corresponding provision in the Second Schedule to the Marriage Act, 1949, which raises precisely the same difficulties. But if “mother” includes a de facto mother in subsection (2) of section 5, “father” would be expected to include a de facto father, certainly in subsection (1) of section 5 of the Act of 1925 and perhaps elsewhere in both Acts, and all the difficulties to which I have referred would arise. The sort of difficulties are illustrated by a passage which I will read from the judgment of Sir William Scott in *Horner v. Horner*.¹² He was concerned in that case with the question whether the consent of the putative father of an illegitimate infant was required to her marriage, but what he said can, I think, well be applied mutatis mutandis to the question of guardians appointed by a putative father under subsection (1) of section 5 of the Act of 1925 if in truth it extends to putative fathers. He said¹³: “If the illegitimate father is to be considered as capable of giving a valid consent, is it every illegitimate father? certainly not; because in many cases no satisfactory evidence can be given of paternity. What evidence is to be required to establish that point? Not his own testimony; because a man cannot be allowed, upon his own claim and assertion only, to make his consent necessary to the marriage of another person. Or is it to be proved by the filiation, in the manner directed by the Act of Parliament, for the special purpose of ascertaining the settlement of the child? Supposing that this evidence which the law has provided for the special purpose of exonerating the parish, and for that purpose only, as far as appears, is to be borrowed and applied to this purpose, it will not answer the exigencies of many cases; it would not in the present case, where no such filiation has been proved, or, I presume, can be proved. But, supposing such filiation, what sort of paternity is acquired by it? In the language of the statutes he is stiled the putative father, he is

¹¹ (1940) 164 L.T. 230; 56 T.L.R. 934.

¹² 1 Hag.Con. 337.

¹³ Ibid. 356, 357.

“still recognized only as a father by mere reputation? Is it then to be asserted that this right of giving consent belongs to every father who is so merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to serve as the foundation of a right of this nature? In what manner, and on what proof, is the licence to be granted,”—that, of course, is the licence to marry—“if it is not to be granted to every such father? In what way is it to be shewn at the time of granting that licence, that he has that popular repute in the requisite degree? Is the acknowledgement of the party, the maintenance and education of the child, to be called in aid? If the mere affidavit of the father is not sufficient for the purpose”—this, of course, is an Ecclesiastical case, not a Chancery case, and this is in reference to the affidavit used in Ecclesiastical courts—“in what way is that evidence to be obtained? Or is a licence to be granted, leaving the question of the validity of the marriage open to future discussion, and to the chance, that if any dispute arises, evidence may be obtained to prove the acknowledgement, the maintenance and education, and the general reputation? Can such a licence with propriety be granted?”

Rather than be involved in difficulties of that nature, I feel compelled to hold that the *prima facie* meaning of the terms “mother” and “father” is not to be departed from unless a compelling reason can be found in the statute for so doing. It seems to me that there is such a compelling reason in the case of the mother in one particular regard, namely, subsection (2) of section 5, and, for my own part, I see no escape from Bennett J.’s decision in *In re A.*,¹⁴ but I find—though this is, perhaps, not strictly relevant—no compelling reason in the case of “mother” anywhere else in the Act. I have indicated the difficulty which I feel in believing that section 5 of the Act of 1886 as amended can possibly have been intended to extend to a mother of an illegitimate child having regard to the conflict to which that would give rise between that provision and the provisions of the Bastardy Acts. However, I realize that that is not strictly necessary for my decision, although I feel that it is certainly impressive for the reasons which I have felt it necessary to give for the conclusion to which I have arrived. That conclusion is that nowhere in the Act is there any compelling reason for extending the term “father” from a *de jure* father to a putative father, nowhere, and that, so far as the word

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¹⁴ 164 L.T. 230.

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"father" is concerned, there are compelling reasons (which I have enumerated) for thinking that what is the *prima facie* meaning is intended to be the meaning throughout those Acts. Accordingly, when at long last, by section 16 of the Administration of Justice Act, 1928, the father was allowed to make an application under section 5 of the Act of 1886 (which is still in force with its various additional clothing), I am satisfied that the word "father" must be construed as meaning legitimate father and does not extend to a putative father.

I should not like to leave this part of my judgment without making some reference to *In re M. (an infant)*.¹⁵ The vital words in that case—which arose under the Adoption Act, 1950—were [section 2 (4)]: ". . . an adoption order shall not be made—"
 "(a) . . . except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant." No affiliation order had been made against the respondent, who was the putative father of the child, and he had never entered into any agreement as to maintenance, so that his consent was only necessary if he was a parent of the infant who had been in that category. Denning L.J. said: "In my opinion the word 'parent' in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires. This is implied in the decision in *Butler v. Gregory*¹⁶ with which I agree. The reason is that the law of England has from time immemorial looked on a bastard as the child of nobody, that is to say, as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognizes no rights in him in regard to the child: whereas the mother has several rights. She has the right to the custody of it during her lifetime until it is 14 years of age; *Humphrys v. Polak*¹⁷: whereas the natural father has no right to the custody of it either during her lifetime (*Rex v. Soper*¹⁸) or after her death (*Ex parte Guardians of St. Mary Abbots*¹⁹). (I may say that there are observations in some Irish cases, such as *In re Kerr*²⁰ and *In re Connor*,²¹ which seem to suggest that, after the mother's death, the natural father has the legal right

¹⁵ [1955] 2 Q.B. 479, 488; [1955] 2 All E.R. 911.

¹⁶ (1902) 18 T.L.R. 370.

¹⁷ [1901] 2 K.B. 385.

¹⁸ (1793) 5 Term Rep. 278.

¹⁹ (1887) 51 J.P. 740.

²⁰ (1889) 24 L.R.Ir. 59.

²¹ [1919] 1 I.R. 361, 390.

“ to the custody, but I do not agree with those observations.)
 “ The mother has a right by deed or will to appoint a guardian
 “ for the child after her death; *In re A., S. v. A.*²²; but the
 “ natural father has no such right: *Horner v. Horner*.²³ ” Pausing
 there, Denning L.J. makes no reference to the possibility that
 the father could do it under section 5 (1) of the Guardianship
 of Infants Act, 1925, and, therefore, I must assume that my
 Lord thought he could not and with that view I respectfully
 agree.

Then the Lord Justice proceeded: “ The mother has the right
 “ to give or withhold consent to the marriage of the child while
 “ under 21, but the natural father has no such right either during
 “ the mother’s life or after her death; see section 3 of the Marriage
 “ Act, 1949 and Schedule 2 ”—that is, in fact, the Schedule to
 which I have already referred in this judgment. “ The natural
 “ father has no right at law to succeed on intestacy. He has
 “ no rights at all, so far as I can see, though no doubt he can
 “ apply for the child to be made a ward of court just as anyone
 “ else can.” There again I certainly assume that Denning L.J.,
 who is familiar with the Guardianship of Infants Acts, took the
 same view of section 5 that I take, namely, that it does not
 apply to an illegitimate child. Then he continued: “ The truth
 “ is that the law does not recognize the natural father at all.”

Romer L.J. said²⁴: “ The mother of an illegitimate child has
 “ both rights and obligations towards it (see, for example,
 “ *Barnardo v. McHugh*²⁵ and *Humphrys v. Polak*²⁶), and it
 “ therefore follows that she should not be subjected unheard to
 “ the operation of section 10 ”—that is section 10 of the Adoption
 Act, 1950. “ The father of a bastard, however, has under our
 “ law no rights in respect of it at all, and to the best of my belief
 “ he never has had.” Then Romer L.J. quoted the dictum of
 Cockburn C.J. which I have already cited, and continued: “ It
 “ was suggested by Mr. Neill that even assuming that such a
 “ father has no rights at common law he is possessed of rights
 “ which would be recognized in the exercise of the equitable juris-
 “ diction over wards of court. In my opinion this is not so. If
 “ the natural child of a man were to become a ward, the court
 “ would certainly permit the father to express his views and
 “ wishes on matters affecting the welfare of the child and would
 “ give effect to them if it thought they were best calculated to

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²² (1940) 56 T.L.R. 934.²⁵ [1891] A.C. 388.²³ 1 Hag.Con. 337, 355.²⁶ [1901] 2 K.B. 385.²⁴ [1955] 2 Q.B. 479, 495.

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“promote the interests of its ward; but he has no right of audience in these matters which gives him precedence over other people, and effect will certainly not be given to his wishes with regard to the infant merely because he is its natural father. Section 10 of the Act of 1950 is concerned with ‘rights’ and in my opinion such locus standi as a man possesses with regard to any natural child of his who becomes a ward of the Chancery Division falls very far short of qualifying as a ‘right.’”

Romer L.J., before he became a member of the Court of Appeal, was the judge to whom appeals under the Guardianship of Infants Acts were assigned; in other words, he was my predecessor in the work which I am now doing and I do derive some comfort from the reflection that, though he did this work for a considerable number of years, it does not seem to have occurred to him that an illegitimate child might be the subject of proceedings under the Guardianship of Infants Acts.

I have been told that a number of magistrates are now giving effect to the view taken by the magistrates in this case, namely, that they have an apparently unrestricted jurisdiction over both custody and maintenance in respect of illegitimate children and that many orders have already been made on that basis, although I should observe that by no means all magistrates accept that view; in other words, it certainly has not become settled policy. No doubt this judgment will have an important and unhappy bearing upon the orders which have been made by magistrates who have taken that view, but in my judgment it is important that no further delay should ensue before this practice is stopped, and for this reason: it may well be (and I am not in the least suggesting the contrary) that it is desirable that magistrates should have jurisdiction over custody and maintenance in the case of illegitimate children, but if it is desirable, it is quite clear to me that considerable modifications ought to be made in the Guardianship of Infants Acts before they exercise that jurisdiction, and it is, of course, trite knowledge that such alterations cannot be made by judicial decision, they are solely within the province of Parliament.

It only remains for me to consider Mr. Clapham’s submission that whatever section 5 of the Guardianship of Infants Act of 1886, as amended, may allow, I can, and ought to, exercise an inherent jurisdiction. To this there appear to me to be two complete answers. First, I am today sitting pursuant to section 7 of the Act of 1925 to hear appeals in cases properly brought

before the magistrates under the Guardianship of Infants Acts and not as a Chancery judge of first instance. Secondly, if I were sitting as a Chancery judge of first instance, the conditions precedent to the exercise of my inherent jurisdiction have not been complied with. In this connexion it will be sufficient to refer to the second part of my judgment in *In re E. (An Infant)* ²⁷ where I declined to exercise my inherent jurisdiction even though sitting as a judge of the Chancery Division in proceedings initiated in the High Court, and I there gave my reasons in detail.

Accordingly, the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co. for John Copland & Sons, Sheerness; Harold Kenwright & Cox.*

J. A. G.

²⁷ [1956] Ch. 23; [1955] 3 All E.R. 174.

BETTY'S CAFÉS LTD. v. PHILLIPS FURNISHING
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[1955 B. No. 4526.]

Landlord and Tenant—Act of 1954—Business premises (Security of tenure)—Landlords' intention to reconstruct—Application for new tenancy—Relevant time of landlords' intention to reconstruct—At time of hearing of tenants' application—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2, c. 56), ss. 30 (1) (f), 31 (1).

Under a series of leases, none of which granted a term exceeding eight years, the tenants had since 1925 carried on their business in premises in Bradford. The landlord company had in 1954 purchased the reversion expectant on the tenants' term with a view to occupying the premises for their own business. On June 28, 1955, the tenants served a notice under section 26 of the Landlord and Tenant Act, 1954, asking for the grant of a new tenancy for a term of 14 years. On August 15, 1955, the landlords gave notice to the tenants that they would oppose the grant of a new tenancy

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under section 30 (1) (f)¹ of the Act of 1954 on the ground that, on the termination of the tenancy, they intended to reconstruct the premises. Before the service of the landlords' notice the landlords' architect had prepared plans for a scheme of reconstruction with an approximate estimate of its cost. No resolution of the board of the landlord company had been passed adopting the scheme before the service of the landlords' notice nor had such a resolution been passed before the beginning of the hearing of the tenants' application by Danckwerts J. on April 16, 1956. On April 23, before the hearing was completed, the board of the landlord company met and passed a resolution that, in the event of the landlords obtaining possession, the works in question would be carried out, expenditure up to £20,000 on such works being approved, and counsel for the landlords was authorized to give an undertaking to the court to that effect:—

Held (Lord Evershed M.R. dissenting), that the relevant date for determining whether landlords, opposing a tenant's application for a new tenancy, had the required intention to reconstruct the demised premises within section 30 (1) (f) of the Act of 1954, was the date of the hearing, and not the date of the service of the landlords' notice of opposition to the grant of a new tenancy or any other date before the hearing; and that it was open to the landlord company to prove that it had the necessary intention at any stage of the hearing down to the time when the court divested itself of further jurisdiction by making an order; and that, accordingly, in determining whether the landlords had proved the necessary intention, consideration should be given to the resolution of April 23, 1956.

X.L. Fisheries Ltd. v. Leeds Corporation [1955] 2 Q.B. 636;

¹ Landlord and Tenant Act, 1954, Part II: "SECURITY OF TENURE FOR BUSINESS, PROFESSIONAL AND OTHER TENANTS."

S. 30: "(1) The grounds on which a landlord may oppose an application under section 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under section 26 (6) thereof . . . (f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding; (g) subject as hereinafter provided, that on the termination of the current

"tenancy the landlord intends to occupy the holding for the purposes . . . of a business to be carried on by him therein . . . (2) The landlord shall not be entitled to oppose an application on the ground specified in paragraph (g) of the last foregoing subsection if the interest of the landlord . . . was purchased . . . after the beginning of the period of five years which ends with the termination of the current tenancy . . ."

S. 31: "(1) If the landlord opposes an application under section 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

[1955] 2 All E.R. 875; *Atkinson v. Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340; *Fisher v. Taylors Furnishing Stores Ltd.* [1956] 2 Q.B. 78; [1956] 2 All E.R. 78; *Reohorn v. Barry Corporation* [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742; and *Fleet Electrics Ltd. v. Jacey Investments Ltd.* [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99 considered.

Per Lord Evershed M.R., dissenting. The relevant date is the date of the landlords' notice given under section 26 (6) of the Act of 1954, or, alternatively, the date of the service of the landlords' notice of opposition to the grant of a new tenancy. The word "intends" in paragraph (f) of section 30 (1), as also in paragraph (g), cannot be read as meaning "is ready and able." The question whether a landlord's intention has been proved at the relevant date is to be considered by ordinary standards of common sense. If there were conditions to which the landlord's proposed course was subject, but if he had no reason to suppose that there would be difficulty in their fulfilment, then, *prima facie*, the landlord would not fail to prove intention within the meaning of the section merely because he could not prove at the date in question that all steps had been taken to satisfy the conditions. It might be otherwise if the proposed course were conditional upon other things being done which were by no means a matter of course; for example, the raising of large sums of money not immediately available.

Decision of Danckwerts J. [1956] 1 W.L.R. 678 reversed.

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APPEAL from Danckwerts J.²

Betty's Cafés Ltd., who were the tenants of business premises known as Nos. 42 and 44, Darley Street, Bradford, in the county of York, applied to the court under section 26 of the Landlord and Tenant Act, 1954, for the grant of a new tenancy. The application was opposed by the landlords, Phillips Furnishing Stores Ltd., under section 30 (1) (f) of the Act on the ground that they intended to reconstruct the premises, or a substantial part of them, on the termination of the tenancy, and that they could not do so without obtaining possession of the holding.

The rateable value of the property being £1,160 (until its present reassessment at £1,627) the court was, by virtue of section 63 of the Act, the High Court.

The tenants had carried on the business of café proprietors and retail confectioners in the greater part of Nos. 42 and 44, Darley Street, since 1925, as tenants under a series of leases; the last dated April 29, 1946, was for a term of eight years expiring on December 31, 1953, at an annual rent of £1,400. Part of the property had been sub-let to a company, who carried on a retail business for the sale of boots and shoes in the ground floor of No. 42 and the basement of No. 44, but on June 24, 1955,

² [1956] 1 W.L.R. 678.

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that company left the premises, and since then the tenants had carried on their business in the whole of the property. For this purpose they made a doorway giving access between Nos. 42 and 44 on the ground floor, so that the ground floor of No. 42 could be used as an extension of the ground floor of No. 44, and they used the shop front of No. 42 for display purposes. The basement of the property was used for a boiler-house and storage and service in connexion with café meals. The ground floor was used as a shop for the sale of bread and chocolates and sweets, and partly as a café for light meals, for which the first floor was also used. There was a ballroom on the second floor, and there was some evidence that a parquet floor had been put in on this floor by the company's predecessors while tenants. The top floor was used for the kitchen required by the company's business. The tenants had similar businesses at Harrogate, York and Leeds, and a factory at Starbeck, Harrogate. Darley Street was one of the principal shopping streets in Bradford, and Nos. 42 and 44, though not in the most sought-after parts of the Bradford shopping district, were in a very good position. The tenants did a substantial business with their shop and café, and the ballroom floor was used extensively for dances, dinners and weddings. The site was thus a very valuable one for the purposes of the tenants' business. The building was probably built about 1903.

The landlords, Phillips Furnishing Stores Ltd., acquired the reversion by a contract dated August 25, 1953, at a price of £38,750, and their intention had been to finance the purchase by a resale and a lease back to the company by an investor at a rent equivalent to 6 per cent. on the investment. The landlords had hoped to occupy the property for the purposes of their furniture business. They, directly or through subsidiaries, owned some 60 shops, but did not have a shop in Bradford when the purchase was made. The purchase transaction appeared to have been approved at a board meeting of the landlords' directors on September 4, 1953, but the purchase was not completed till March 1, 1954. The interest acquired was the remainder of a term of 999 years from January 1, 1806, at a ground rent of £15 6s. 0d. per annum under a lease dated May 1, 1806.

An application had in the meanwhile been made to the Bradford county court under the Leasehold Property (Temporary Provisions) Act, 1951, by the tenants for a new tenancy of the property, and on September 23, 1953, the court made an

order for a new tenancy of No. 42 and No. 44, Darley Street (then occupied partly by the tenants and partly by the sub-tenants) for a period of 12 months from January 1, 1954, at a rental of £2,000, and on the same terms otherwise as in the existing lease.

On October 27, 1953, one Buckle, an estate agent, acting on behalf of the landlords, on instructions from a director of the firm, approached one Hall, a member of a firm of estate agents (who acted for the tenants), with a tentative proposition that the landlords should resell the property to the tenants for £45,000. The matter was mentioned to Mr. Wild, a director of the tenants, but the matter proceeded no further at this stage, although Mr. Wild was interested.

On December 16, 1954, a Mr. Jones, the secretary and a director of the landlords, wrote to Mr. Ovenden, their architect, instructing him to prepare plans of the work which the landlords would carry out in Nos. 42 and 44, Darley Street to adapt the property for their use. Mr. Jones wrote: "List them out, roughly price them and let me have it," and added "This is most important as structural alterations and so on form one of the means upon which a landlord can serve notice and possibly secure possession."

Accordingly, Mr. Ovenden visited the site, and on January 7, 1955, he sent to Mr. Jones a copy of the drawing of the premises as existing and a proposed suggestion together with a brief outline specification describing the latter, and he mentioned that the approximate cost of the work would be £20,000. Those were the works on which the landlords, Phillips Furnishing Stores Ltd., had relied for the purpose of section 30 (1) (f) of the Act. No bills of quantities or detailed plans, however, had been prepared, and no steps had been taken to secure the approval of the local authority.

On January 26, 1955, a meeting of the landlords' board decided that "unless Messrs. Betty's were prepared to vacate for a more or less nominal consideration, the present position should not be disturbed until the required five years had elapsed (approximately 3½ years to run), at the end of which the company could with security serve the appropriate notice upon Betty's and their subtenants and obtain possession." Mr. Jones was present at this meeting, but there was no evidence that the proposed plans and details of work were ever mentioned at this meeting.

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In March, 1955, however, as the result of a discussion between Mr. Buckle and Mr. Jones and Mr. M. Winstone, one of the managing directors of the landlords, the suggestion of a purchase of the property by the tenants was reopened. In June, 1955, agreement had been reached, subject to contract, that the tenants should purchase the property for £55,000, and should resell the property to the National Coal Board Superannuation Fund for £56,250, and take a lease from the latter for 42 years with full repairing and insuring covenants at an annual rent of £3,515 6s. 0d., and on June 17, 1955, the solicitors for the landlords, in pursuance of instructions given by Mr. Jones, sent to the solicitors for the tenants a formal contract for approval. On that day, June 17, 1955, however, a meeting of the landlords' board of directors was held. The minute of this meeting was as follows: "Mr. M. Winstone recorded that Betty's Cafés, the sitting tenants, were prepared to purchase the property for £55,000. After a full discussion it was resolved that it would be in the company's interest to retain the property although the company would not obtain possession for some three years."

It was stated in evidence by Mr. Jones that Sir Ronald Matthews, the chairman of the company, secured this decision against the views of those directors who were in favour of the sale. On the same day Mr. Jones wrote to Mr. Buckle, informing him of the board's decision and asking him "to call off all negotiations."

The contentions put forward at the trial, and supported by the evidence of Mr. Jones, involved the total repudiation of any authority from the board for Mr. Jones or Mr. M. Winstone to have opened or pursued the negotiations or to bind the landlords in any way without the authority of a resolution of the board of directors.

Having been deprived of their expectation of acquiring the property by purchase, the tenants decided to make an application under the Landlord and Tenant Act, 1954. On June 28, 1955, they served a notice requesting a new tenancy of the whole of the property for a period of 14 years, at a rent of £2,500, since raised to £2,750 per annum, the other terms of the tenancy to be those contained in the lease of April 29, 1946. On August 15, 1955, a notice of opposition was sent, purporting to be signed by Mr. Jones on behalf of the landlords. No resolution of the board of directors of that company authorizing this step was proved, and, in view of the attitude of the landlords in regard to the ostensible authority of Mr. Jones, Danckwerts J. stated that

he was doubtful whether he should treat this notice of opposition as having any validity. The grounds relied on in the notice were that on the termination of the current tenancy the landlords intended to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that they could not reasonably do so without obtaining possession of the holding; and were, therefore, entitled to possession under paragraph (f) of section 30 (1) of the Act. On November 25, 1955, according to the landlords' minute, there was a meeting of the board of directors of the company at which Mr. M. Winstone reported that their architect had surveyed the property and estimated that reconstruction would cost in the region of £15,000. It was decided to approve expenditure thereon up to that sum.

Danckwerts J. began the hearing of the tenants' application on April 16, 1956. After the tenants' case was closed, on April 23, the board of the landlord company held a meeting and passed the following resolution: "(1) That in the event of the company obtaining possession of these premises from Betty's Cafés Ltd. on the termination of the last mentioned company's current tenancy thereof the works detailed in Mr. Ovenden's specification dated January 1955 and plan numbered 45/2 be forthwith carried out and that expenditure of up to £20,000 upon such works be approved.

"(2) That counsel appearing for the company in the application by Betty's Cafés Ltd. now proceeding in the Chancery Division be authorized to give an undertaking either to the court or to Betty's Cafés Ltd. that the above mentioned works will be carried out as soon as is practicable in the event of possession being so obtained."

Danckwerts J. held that the landlords' proposal amounted to a substantial reconstruction of the demised premises and possession was necessary for the purpose of effecting the reconstruction and that this condition of paragraph (f) had been satisfied. He held, however, that the landlords had failed to prove the necessary firm and settled intention to carry out the works at the relevant time, which was the date of the service of the landlords' notice of opposition to the grant of a new tenancy and, accordingly, that the tenants were entitled to be granted a new tenancy. This he granted for 14 years, the maximum period allowed by the Act, at a rent of £3,000 per annum.

The landlords appealed.

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J. P. Widgery for the landlords. The main contention of the landlords is that Danckwerts J. was wrong in holding that in order to satisfy the requirements of section 30 (1) (f) the landlords' intention to reconstruct the demised premises must be a fixed and settled intention at the date of the service of his notice of opposition to the granting of a new tenancy. It is submitted that the intention may be established at any time up to the close of the hearing of a tenant's application. It is admitted that there was no resolution of the board of the landlord company until April 23, 1956, and that the landlords must fail if that resolution was too late. It was admissible in evidence and the judge should not have refused to take it into consideration. The relevant date for establishing a landlord's intention was touched on by the court in three cases. *X.L. Fisheries Ltd. v. Leeds Corporation*³ shows that a landlord may put his tackle in order after he has served his notice. In *Reohorn v. Barry Corporation*⁴ the landlord's intention was not complete at the date of the hearing. In that case Denning L.J. expressed the opinion that the date of the hearing was the relevant date. In *Fleet Electrics Ltd. v. Jacey Investments Ltd.*⁵ also the landlord had no fixed intention at the date of the hearing. These decisions, however, throw no light on the question whether the intention must be formed at the date of the service of the notice.

All that the landlord has to do is to state in his notice the ground on which he will oppose the tenant's application for a new lease. The notice is a kind of pleading. The landlord cannot rely on any ground which is not stated in the notice. The notice is a warning to the tenant of the case he will have to meet. Once served it is spent. There is nothing in the relevant sections to show that the landlord has to establish his intention at two different dates. The material date is the date of the hearing. It may be difficult for the landlord when he serves his notice of opposition to have a firm and settled intention. His intention may be merely conditional. The tenant can choose the date when he will serve his notice under section 26 asking for a new lease. The landlord, when it is served, may be ill or away. If the hearing is the material date the landlord has more time in which to make his plans. There is no reason why a landlord should not rely on more than one ground of opposition in his

³ [1955] 2 Q.B. 636; [1955] 2 All E.R. 875.

⁵ [1956] 1 W.L.R. 1027; [1956] 3 All E.R. 99.

⁴ [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

notice. He must establish his ground at the date of the hearing. For example, ground (d), that there is alternative accommodation available, must be established at the date of the hearing. There is no power under the Act to extend the time within which the landlord must serve his notice. It may be unfair to require the landlord to commit himself when the notice is served. There is nothing in the Act which would justify the court in holding that the landlord need prove a conditional intention when he serves his notice and a firm intention at the hearing.

Grounds (a), (b) and (c) must be established at the hearing. There is no reason for suggesting that the intention required to be proved to establish grounds (f) and (g) has to be established at a different time. If the landlord serves a false notice, the tenant's remedy lies in section 55, under which he can claim compensation.

With regard to the length of the term ordered by Danckwerts J., fourteen years is too long having regard to the fact that the landlords purchased the property for their own occupation. If the tenants are granted a new term it should be for five years. [Reference was made to *Reohorn v. Barry Corporation*⁶; *Upsons Ltd. v. E. Robins Ltd.*⁷]

Lionel A. Blundell and C. B. Priday for the tenants. With regard, first, to the length of the term, the judge was influenced, in ordering the grant of a 14 years' term, by the manner in which the landlords had behaved. He had all the facts before him and he had a discretion as to the term which should be granted. It was not necessary for him to state the grounds on which he reached his conclusion. The court should be reluctant to interfere with the way in which he exercised his discretion: *Moor v. Moor*.⁸ Here the tenants had been in possession for a long period and they had improved the property and required security. In referring to the five year period the landlords imply that they have a right to possession at the end of that period. That is not so. A 14 years' term is reasonable in the circumstances.

As to the relevant date at which the landlords' intention must have been formed: the tenants contend that the right date is the date of the service of the notice. If that is not the date, the landlords' intention must exist when the hearing begins. Here the landlords did not establish that intention at either of those dates. Nor did they establish the requisite intention at all. The

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landlords had no intention of doing these works unless they got possession for the purposes of their own business. In *Atkinson v. Bettison*⁹ the premises were required for demolition. Here, if the landlords did not want the premises for their own use, they would not want to reconstruct. The question of a conditional intention was not considered in *Fisher v. Taylors Furnishing Stores Ltd.*¹⁰

When the other grounds of opposition are considered, grounds (a), (b), (c) and (d) must be true at the date of the service of the landlord's notice. The landlord's intention under ground (f) should also be established at that date. The notice must be one on which a tenant can safely act. The assertion of a false intention cannot have the same effect as a genuine intention. The tenants rely on the observations of Lord Evershed M.R. in *Fleet Electrics Ltd. v. Jacey Investments Ltd.*¹¹ and on the observations of Asquith L.J. in *Cunliffe v. Goodman*.¹² It is not suggested that when the notice is served every permit must have been obtained. [Reference was also made to *Reohorn v. Barry Corporation*¹³; *Austin Reed Ltd. v. Royal Insurance*¹⁴; *Fisher v. Taylors Furnishing Stores Ltd.*¹⁵; *Fleet Electrics Ltd. v. Jacey Investments Ltd.*¹⁶; *Doe d. Lyster v. Goldwin*,¹⁷ and *Budge v. Hicks*.¹⁸]

Section 31 (1) of the Act is directed to what was the position at the date of the service of the notice. Reference to ground (f) is in the present tense and shows that there must be a continuing intention. If the date of the notice is the relevant date, the landlords' appeal must fail; if the later date is the correct date the appeal should also fail, since, on the evidence, the landlords have not established the requisite intention.

J. P. Widgery in reply. The facts required to establish grounds (a), (b), (c) and (d) must be considered at the date of the hearing. It is not really disputed that the intention for the purposes of grounds (f) and (g) must exist at the date of the hearing. It must follow that it is not necessary to prove intention at the date of the service of the notice, since there is nothing

⁹ [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

¹⁰ [1956] 2 Q.B. 78; [1956] 2 All E.R. 78.

¹¹ [1956] 1 W.L.R. 1027, 1030; [1956] 3 All E.R. 99.

¹² [1950] 2 K.B. 237, 253, 254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

¹³ [1956] 1 W.L.R. 845.

¹⁴ Judgments of the Court of Appeal, 1956, No. 217a.

¹⁵ [1956] 2 Q.B. 78.

¹⁶ [1956] 1 W.L.R. 1027.

¹⁷ (1841) 2 Q.B. 143.

¹⁸ [1951] 2 K.B. 335; [1951] 2 All E.R. 245; sub nom. *Hicks v. Budge* [1951] 2 T.L.R. 349.

in the Act to impose a burden on a landlord of proving intention at two dates. The notice of April 23 showed the landlords' firm and settled intention to do the works of reconstruction.

November 28. The following judgments were read.

LORD EVERSHERD M.R. I will ask Birkett L.J. to deliver the first judgment.

BIRKETT L.J. This is an appeal from a decision of Danckwerts J. given on May 7 of this year. He decided that a company known as Betty's Cafés Ltd. was entitled to be granted a new lease of certain premises in Bradford, 42 and 44, Darley Street, under the provisions of the Landlord and Tenant Act, 1954. The landlords, Phillips Furnishing Stores Ltd., appeal to this court against that decision.

The relevant facts would appear to be: the tenants, Betty's Cafés Ltd., had carried on the business of café proprietors and retail confectioners in these premises since 1925. They had held the premises on a series of leases, none of which had ever exceeded a term of eight years, and the last lease, dated April 29, 1946, was for a term of eight years expiring on December 31, 1953. Since June 24, 1955, the tenants had been in possession of the whole of the premises, a portion formerly having been sub-let to William Timpson Ltd. The premises were excellently situated in Bradford, and the tenants did a very substantial business there. They were naturally anxious to remain where they had carried on business for so long, and invoked the provisions of the Act of 1954 to enable them to do so. The landlords, Phillips Furnishing Stores Ltd., bought the property on August 25, 1953, for £38,750. The interest they acquired was the remainder of the term of 999 years from January 1, 1806, at a ground rent of £15 6s. 0d.; completion did not take place until March 1, 1954. The purchase in August, 1953, was made no doubt with the intention of opening a shop in Bradford when the lease to the tenants expired, and it was thought that a wise method of doing this would be to resell the property and obtain from the purchaser a lease to the landlords at a rent that would bring a return of 6 per cent. to the purchaser. The landlords owned some 60 shops in various parts of the country where they carried on the business of furniture dealers. On September 23, 1953, that is, in the month following the acquisition of the property by the landlords, the judge of the

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Bradford county court made an order for a new tenancy of 42 and 44, Darley Street, for a period of 12 months from January 1, 1954, under the provisions of the Leasehold Property (Temporary Provisions) Act, 1951. The new tenancy was to be at a rent of £2,000 and on the same terms as the existing lease.

The Landlord and Tenant Act, 1954, came into operation on October 1, 1954. Part II of the Act is concerned with security of tenure for business, professional and other tenants. Section 23 defines the tenancies to which Part II of the Act applies; and section 23, so far as the material words in this case are concerned, says: "(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes." Section 24 provides for the continuation of tenancies to which Part II of the Act applies, and for the grant of new tenancies, the material words being in subsection (1): "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of section 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act." The substance of the matter, therefore, so far as the present appeal is concerned, at this stage is that: (a) subject to the provisions of the Act, Part II applies to any tenancy where the property comprised in the tenancy is occupied by the tenant for the purposes of a business, and that covers the property 42 and 44, Darley Street, Bradford; (b) the tenancy of 42 and 44, Darley Street, will not come to an end at the expiration of the term unless terminated in accordance with the provisions of the Act; and, subject to section 29 of the Act, the tenants may apply to the court for a new tenancy if (a) the landlord gives notice under section 25 of the Act or (b) the tenant has requested a new tenancy under section 26 of the Act.

On June 28, 1955, the tenants served a notice on the landlords requesting a new tenancy, thus invoking section 26 of the Act, and asked for a period of 14 years at a rent of £2,500, the rest of the terms of the new tenancy to be the same as those in the lease of April 29, 1946. On August 15, 1955, notice was given by the landlords that they would oppose the application for a new

tenancy, and this notice was signed by Mr. Jones, who was the secretary and a director of the landlord company. The ground relied on in the notice was the ground set out in section 30 (1) (f) of the Act of 1954, that on the termination of the present tenancy the landlords intended to reconstruct the premises, and they could not reasonably do so without obtaining possession of the premises. This was in accordance with section 26 (6) of the Act of 1954.

It is important to remember that by the provisions of section 30 (1) (g) of the Act of 1954 a landlord can oppose an application by a tenant for a new tenancy if he establishes to the satisfaction of the court that at the termination of the current tenancy he intends to occupy the premises for the purposes of his own business, to be carried on in the premises, or for his own residence; but he is not allowed to set up this ground of opposition if his interest was created after the beginning of the period of five years which ends with the termination of the current tenancy and if at all times since the creation of the interest the premises had been held on a tenancy within section 23 (1) of the Act of 1954. The landlords could not rely on ground (g), therefore, and relied solely on ground (f).

In *Atkinson v. Bettison*,¹ *J. W. Smart (Modern Shoe Repairs) Ltd. v. Hinckley and South Leicestershire Permanent Benefit Building Society*,² and *Fisher v. Taylors Furnishing Stores Ltd.*³ the Court of Appeal has discussed the grounds (f) and (g) of section 30 (1) of the Act of 1954, and Danckwerts J. examined them carefully in the court below. But I do not think it necessary to discuss them further, for whilst the decision in *Atkinson v. Bettison*⁴ has been reconsidered and explained in later cases, the position in this appeal is reasonably clear.

Whether the proposed work on the premises satisfies the conditions laid down in section 30 (1) (f), "that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding," is a matter for the court to determine on the evidence produced before it. In the present case Danckwerts J. was satisfied that the work proposed by the landlords did satisfy

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¹ [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340.

² [1952] W.N. 484; [1952] 2 T.L.R. 684; [1952] 2 All E.R. 846.

³ [1956] 2 Q.B. 78; [1956] 2 All E.R. 78.

⁴ [1955] 1 W.L.R. 1127.

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the conditions and that finding was in accordance with the evidence. There was here "substantial work of construction." The judge was also satisfied that possession of the premises was necessary for carrying out the works in question. The only remaining question, therefore, was whether the landlords had established to the satisfaction of the court that they intended to carry out the works in question.

Danckwerts J. considered first of all what was the relevant time when the intention mentioned in section 30 (1) (f) must exist. He held that the relevant time was at the date of the service of the notice by the landlords—that is, August 15, 1955—and, further, that on that date the company had failed to establish that they had any such intention. He thereupon granted to the tenants a new tenancy of the premises under sections 33 and 34 of the Act of 1954. It was to be a tenancy for 14 years, the maximum term permitted by section 33, at a rent of £3,000 a year. The other terms of the tenancy were to be those of the lease of April 29, 1946. The landlords appeal against this decision and ask that the application by the tenants for a new tenancy should be dismissed. In the alternative, they say that, if the application is granted, the term of 14 years is excessive and inequitable and that it should be reduced to three years.

The first and most important question to be determined is: what is the relevant date at which the intention referred to in section 30 (1) (f) must be shown to exist? It was submitted on behalf of the landlords that the judge was wrong in deciding that the relevant date was the date of the landlords' notice, and the relevant date, they say, was the date of the hearing of the application in the court up to the moment when judgment was given. This precise point has never been judicially determined. In *Reohorn v. Barry Corporation* ⁵ Denning L.J. expressed the view that the relevant date was the date of the hearing, but the case did not raise the point and called for no decision. Parker L.J. reserved the point in the same case. Danckwerts J., in the present case, was obviously much influenced by some observations of Lord Evershed M.R. in *X.L. Fisheries Ltd. v. Leeds Corporation*,⁶ where Lord Evershed M.R. said: "It is . . . quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having

⁵ [1956] 1 W.L.R. 845; [1956] 2 All E.R. 742.

⁶ [1955] 2 Q.B. 636, 646; [1955] 2 All E.R. 875.

“acquired the premises or the reversion since the date of the request, is able to say when he puts in his notice of opposition before the two months’ period expires that he is the landlord and . . . that on the termination of the current tenancy he intends to reconstruct.” But the point in that case was not the point in this appeal, and it is therefore true to say that there is no authority which binds this court on the question of what is the relevant date.

There are two modes of procedure laid down in the Act of 1954: the first, the termination of the tenancy by the landlord under section 25, and by subsection (6) of that section the landlord’s notice “shall not have effect unless it states whether the landlord would oppose an application to the court under this Part of this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in section 30 of this Act he would do so”; the second, the tenant’s request for a new tenancy under section 26 of the Act, and by subsection (6) “Within two months of the making of a tenant’s request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in section 30 of this Act the landlord will oppose the application.”

It is clear that the grant or refusal of a new tenancy is to be determined by the court, and, whether the landlord begins the proceedings under section 25 or the tenant begins under section 26, the landlord must state in the notice which he is bound to give, under either section, which of the grounds mentioned in section 30 he relies on to defeat the tenant’s claim. Section 30, which sets out the grounds on which a landlord may oppose an application by the tenant for a new tenancy, says in its material words: “The grounds on which a landlord may oppose an application under subsection (1) of section 24 of this Act are such of the following grounds as may be stated in the landlord’s notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say,” then setting them out, (a), (b), (c), (d), (e), (f) and (g). In this appeal, ground (f) alone is relied on, but on the question whether the relevant date is the date of the landlord’s notice or not, the other grounds in the section are not unimportant; (a) reads in this way: “where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy

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“in view of the state of repair of the holding, being a state
“resulting from the tenant’s failure to comply with the said
“obligations.”

Now the language of section 31 (1) uses these words: “If the
“landlord opposes an application under subsection (1) of section 24
“of this Act on grounds on which he is entitled to oppose it in
“accordance with the last foregoing section and establishes any of
“those grounds to the satisfaction of the court, the court shall not
“make an order for the grant of a new tenancy.” Under section 30
(1) (a) let it be supposed that at the date of the hearing of the
application the state of repair was excellent and that the landlord
could not possibly establish to the satisfaction of the court that any
fault could be found with the state of repair then existing. Is
the court then to decide the question: what was the state of
repair when the landlord served the notice? If the tenant were
to say: “It is true that the landlord had cause to complain when
“he served the notice, and I am very sorry about it, but it was
“due to a series of misfortunes which left me without the
“necessary labour to perform my covenants, as I would have
“wished; but happily that trouble is over and the property is in
“perfect condition and will be kept so,” is the court to say:
“It is too late; all the court can consider is what was the state
“of repair at the date of the notice”? That would be, in my
view, to interpret section 30 (1) (a) as though the words were
“. . . in view of the state of repair of the holding at the date of
“the landlord’s notice,” and the Act refrains from using any
such language. The notice is in fact saying: “This ground is
“the ground on which I shall oppose your application to the
“court when the matter comes to be determined.”

Section 30 (1) (b) reads: “that the tenant ought not to be
“granted a new tenancy in view of his persistent delay in paying
“rent which has become due.” This again is a subsection which
makes use of the words “ought not.” This would seem to leave
some discretion in the court which hears the application to decide
whether the application ought or ought not to be granted. In
practice, the court would look at the history of the payments and
make its decision; but if the tenant had some very good reasons
to explain delays, and very good grounds for assuring the court
that the like situation would never arise again, it seems difficult
to say that the court could not listen to evidence to show how
completely the situation had changed from the date of the
notice to what it was at the date of the hearing, and that it was
prevented from taking the evidence into account in considering

whether the landlord had established to the satisfaction of the court that the court "ought not" to grant the application.

Section 30 (1) (c) reads: "that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding." This again is a subsection which uses the words "ought not." Suppose the breaches of obligation to have been made good between the date of the notice and the date of the hearing, or suppose the "reason connected with the tenant's use or management of the holding" to have vanished between the date of the notice and the date of the hearing, is the evidence inadmissible, because the court can only consider the state of affairs existing at the date of the notice? The words "ought not" imply that the court must see whether the landlord has established the ground on which he relies to the satisfaction of the court, and this must, in my judgment, permit the court to look at all relevant matters down to the actual hearing. In cases where grounds (a) or (b) or (c) are relied on, the court must exercise its discretion on the evidence given before the court at the hearing.

Section 30 (1) (d) reads: "that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding."

At the hearing of the application, the landlord must establish to the satisfaction of the court that he has fulfilled the various conditions laid down in the subsection. He must therefore show that the alternative accommodation is available at the hearing, and must then be in the position to express his willingness to provide it, or to secure its provision for the tenant. The time at which the alternative accommodation will be available must be suitable to the tenant's requirements, and the court must be satisfied on all these points. At the date of the notice, the landlord might very well be unable to offer the requisite alternative accommodation, though he was negotiating in order to be

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able to do so at the hearing. If at the hearing the landlord was able to fulfil all the conditions of the subsection, and established this to the satisfaction of the court, there would be no discretion left in the court to order the new tenancy; and, provided that the landlord had stated the ground in his notice, the mere fact that it was not possible at the date of the notice to fulfil all the requirements of the section would not enable the court, in my judgment, to say that the landlord was debarred from establishing the ground at the hearing.

In the present appeal the only ground relied on is that of subsection (f) of section 30 (1). Danckwerts J. said⁷: "It seems to me that this must be the vital moment, that at the date of the service of the notice of objection it must be true in fact that the landlord intends to carry out the work of reconstruction." He held that the landlords were quite unable to establish this intention to his satisfaction and he made an order for a new tenancy.

Two considerations must be kept in mind in considering what is the relevant date to which the court must look at the hearing: (a) that there will always be a considerable time between the notice and the hearing, and in that time great changes may take place; (b) the wording of section 25 (6), "would oppose an application to the court"; the wording of section 26 (6), "he will oppose an application to the court," and "... such notice shall state on which of the grounds ... the landlord will oppose the application"; section 30 (1), "may oppose an application," "grounds as may be stated in the landlord's notice"; and the whole of subsection (1) of section 31. It is also to be observed that (d), (e) and (f) of section 30 (1) are subject to special treatment under section 31 (2) of the Act of 1954.

I am of opinion that the judge was wrong in holding that the relevant date for the consideration of the court was the date of the notice, and in my opinion the proper date is the date of the hearing before the court, when the landlord has to establish that ground, or those grounds, stated in his notice to the satisfaction of the court. The court is given a discretion under (a), (b) and (c) of the section to decide whether the tenant ought to be granted a new tenancy, and that discretion must be exercised on the material then before the court at the date of the hearing; and with regard to (d), (e) and (f) of the section, the court must

⁷ [1956] 1 W.L.R. 678, 689.

decide on the material before the court at the hearing, and not on what was the position at the date of the notice, though the whole history of the matter must be considered when deciding whether the requisite intention has been satisfactorily established. In the vast majority of cases, of course, the position at the date of the notice and at the date of the hearing will be exactly the same. The landlord is unlikely to put into his notice any ground upon which he has no intention of relying; but, in view of the imperative duty to state his grounds in the notice, if he is to be heard at the hearing before the court, the landlord may very well put in his notice a ground about which he has not fully made up his mind at the date of the notice, because the decision rests upon facts which have still to be made clear. The notice, in my opinion, is to be regarded in the nature of a pleading, giving notice to the tenant of the case he will have to meet at the hearing, under any of the matters set out in section 30. Alternative accommodation, for example, may have been available at the date of the notice, and not available at the date of the hearing. It is the date of the hearing, in my view, which will determine that ground, for it could not be established to the satisfaction of the court if at the date of the hearing it was non-existent. If that were the only ground, the tenant's application would be undefended, despite the fact that at the date of the notice every element in section 30 (d) had been fully met. Similarly, under section 30 (f), if at the date of the notice the intention could not be said to be a firm and settled intention because of special circumstances, but at the date of the hearing the intention required by law was established to the satisfaction of the court, the tenant's application would be defeated.

It becomes necessary, therefore, to consider whether the landlords have established the grounds on which they relied, which were, of course, the grounds set out in section 30 (1) (f) of the Act of 1954, on the footing that the judge ought to have considered the question as at the date of the hearing and not, as he did, at the date of the notice. The judge reviewed the evidence with great care, but it is only necessary to mention the principal facts for the purpose of this judgment. It is clear that the intention of the landlords varied a great deal from time to time. It may be taken that they bought the property for £38,750 with the intention of occupying it themselves for the purpose of their furniture business. There was a time when they thought of reselling the premises and obtaining a lease from the purchasers; they thought, also, of selling to the tenants, and

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negotiated to that end; they contemplated making structural alterations, so that they might get possession at the end of the existing term; they negotiated a second time with the tenants; and they had also thought of waiting until they could acquire the property under paragraph (g) of section 30 (1); and it cannot be doubted that from time to time they were in the greatest uncertainty as to what was best to do with the property they had bought. On June 17, 1955, a meeting of the board of directors of the landlords resolved "to retain the property "although the company would not obtain possession for some "three years." The tenants received this decision with some justifiable surprise and resentment, for the negotiations to purchase the property had proceeded almost to the final stages. The tenants thereupon, on June 28, 1955, served the notice requiring a new tenancy. On August 15, 1955, the landlords served the notice of opposition. This notice, which was in the form required by the statute, was signed by a Mr. Jones, who was the secretary and a director of the landlords. In fact, there was no resolution of the board authorizing this notice, and as the authority of Mr. Jones in the earlier negotiations had been repudiated, the judge was doubtful, first of all, whether he should treat the notice as a valid notice at all. But, treating it as a valid notice, the judge found that the proposed works, which were explained in evidence, satisfied the conditions laid down in section 30 (1) (f), and he held, further, that possession of the holding would be necessary for the carrying out of the works. But the judge held that the landlords had not established to his satisfaction that they intended to reconstruct the premises within the meaning of section 30 (1) (f). Whilst stating that a company may exercise its functions through agents, and that a resolution of the board is not essential, he yet found on the particular facts of the case that the intention of the company could only be found in the resolutions of the board as recorded in the minutes. The landlords had repudiated the authority of Mr. Jones, Mr. M. Winstone (another director) and Mr. Buckle (an estate agent) to act on behalf of the landlords when the negotiations for sale were proceeding; Mr. Jones disclaimed any authority to bind the landlords without a meeting of the directors to confirm his actions; the affidavit for the purpose of opposing the tenants' application was sworn by the assistant secretary (Mr. Jones, the secretary, being ill); and no other director was called to give evidence.

The two material minutes upon this matter are, first, the minute of November 25, 1955, which reads: "Mr. M. Winstone

“reported that the company’s architect had surveyed the property and estimated that reconstruction would cost in the region of £15,000. It was decided to approve expenditure thereon up to that sum”; and the second one is April 23, 1956. That reads: “Mr. Jones and Mr. Nicholson reported upon the case of Betty’s Cafés Ltd. versus the company now proceeding in the High Court,” the resolution which I am about to read having been passed during the days when this case was actually being heard by Danckwerts J. “It was resolved: (1) That in the event of the company obtaining possession of these premises from Betty’s Cafés Ltd. on the termination of the last-mentioned company’s current tenancy thereof the works detailed in Mr. Ovenden’s specification dated January, 1955, and plan numbered 45/2 be forthwith carried out and that expenditure of up to £20,000 upon such works be approved,” the minute of November stating £15,000. “(2) That counsel appearing for the company in the application by Betty’s Cafés Ltd. now proceeding in the Chancery Division be authorized to give an undertaking either to the court or to Betty’s Cafés Ltd. that the above-mentioned works will be carried out as soon as is practicable in the event of possession being so obtained.”

Much discussion took place before us on the nature of the intention required by section 30 (1) (f), and the words of Asquith L.J. in *Cunliffe v. Goodman*⁸ were invoked, as were the judgments in *Reohorn v. Barry Corporation*.⁹ Danckwerts J. thought that the resolution of April 23, passed when the case was actually being heard by the court, and after the case had proceeded for some time, was too late for the landlords to rely upon it, and criticized its conditional character. It was, in my opinion, quite open to the landlords to say, as they did, that their intention was to reconstruct; and the undertaking that counsel was instructed to give would seem to indicate that particular intention of the landlords. But the judge decided the case on the ground that the resolution of April 23, 1956, was too late to be effective, and without it he said the intention required by the subsection was not established to his satisfaction.

The conduct of the landlords is open to severe criticism. There is no resolution of the board of the company before April 23, 1956, recording an intention to carry out works of reconstruction at the end of the tenant’s tenancy, or at any other time. The resolution

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⁸ [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

⁹ [1956] 1 W.L.R. 845.

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of November 25, 1955, approved expenditure up to £15,000, although on January 7, 1955, Mr. Ovenden, the company's architect, had written to say that he had surveyed the premises and estimated the work of reconstruction to make the premises suitable for the landlords' business would be £20,000. In the light of the history of the landlords' vacillations and changes of policy, and particularly in view of the fact that no resolution was passed before April 23, 1956, the judge had formed a view very adverse to the landlords.

The resolution of the board on April 23, 1956, may be criticized as being tardy, but it is not inadmissible, in my view. If it is admissible, it is clearly very important on the question the judge had to decide, for not only does it express the intention of the landlords, but it is linked with a resolution to empower the counsel for the landlords to give an undertaking to the court that the expressed intention will be carried out. In my opinion, the judge ought to have considered the effect of the resolution before deciding that the landlords had failed to establish the requisite intention to the satisfaction of the court.

It is quite within the bounds of possibility that, after considering the effect of the resolution of April 23, 1956, the judge might still say, for good and sufficient reasons, if they are supported by the evidence, or if the evidence justifies the drawing of the necessary inferences, that the landlords had failed to establish the requisite intention to the satisfaction of the court. But I do not think, in the view which I have formed as to the relevant date to be considered, that he was entitled to come to that decision without giving full consideration to the resolution of April 23, 1956. I think the case should go back to him for further consideration on the footing that the resolution of the board was not too late for it to receive consideration.

The length of the new tenancy, if granted, in my opinion should be five years. The term of 14 years granted by the judge was the maximum the Act of 1954 allows, and, having regard to the previous terms and the provisions of section 30 (1) (g) of the Act of 1954, I would reduce the term from 14 to five years and leave the other terms as suggested by the judge.

I would allow the appeal and refer the case to the judge for further consideration.

LORD EVERSHED M.R. I will ask Romer L.J. to deliver the next judgment.

ROMER L.J. In pursuance of section 26 of the Landlord and Tenant Act, 1954, the tenants, Betty's Cafés Ltd., served upon their landlords, Phillips Furnishing Stores Ltd., a request for a new 14-year lease of the premises 42/44, Darley Street, Bradford, to commence on June 24, 1956. The request was dated June 28, 1955, and on August 15, 1955, the landlords served on the tenants a counter-notice, under section 26 (6) of the Act, stating that they were not willing to grant a new tenancy of the premises. Paragraph 2 of this counter-notice stated that "the grounds on which we shall oppose any application which you may make to the court for the grant of a new tenancy of the said property are that on the termination of the current tenancy we intend to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof, and that we could not reasonably do so without obtaining possession of the holding."

The grounds of opposition stated in the counter-notice are those referred to in section 30 (1) (f) of the Act, and it is provided by section 31 that, if a landlord opposes a tenant's application on grounds on which he is entitled to oppose it in accordance with section 30, and establishes any of those grounds to the satisfaction of the court, "the court shall not make an order for the grant of a new tenancy."

In order that the landlords in the present case should succeed in their opposition, it is, in my opinion, clear that they must satisfy the court, when the tenants' application for a new tenancy is before it, that they then entertain the intention indicated by their counter-notice. The principal question which was argued on the present appeal, however, is whether they must also satisfy the court that the relevant intention existed at some earlier point of time; and, in particular, that it existed when they served their counter-notice upon the tenants. Danckwerts J. has given an affirmative answer to this question, and my regret at expressing a different view is naturally increased by the fact that the judge's conclusion has commended itself also to the Master of the Rolls.

There is no express authority upon the point. In *Reohorn v. Barry Corporation*¹⁰ Denning L.J. expressed a provisional view (for the point did not arise for decision) that the relevant time for establishing the intention is the date of the hearing of the application. Parker L.J., in the course of his judgment in the same case, expressly left the question open. In *Fleet Electrics Ltd. v. Jacey Investments Ltd.*¹¹ it appears from the judgment of

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¹⁰ [1956] 1 W.L.R. 845, 850.¹¹ [1956] 1 W.L.R. 1027, 1036.

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Lord Evershed M.R. that it was assumed by counsel on both sides (for the question was not in issue) that the requisite intention must exist in the landlord's mind when he serves his notice on the tenant under section 25 of the Act, and that it must continue up to the date of the hearing. Neither Lord Evershed M.R. nor either of the other members of the court expressed any opinion upon the matter. In *X.L. Fisheries Ltd. v. Leeds Corporation*¹² Lord Evershed M.R. made the observations to which Danckwerts J. referred in his judgment in the present case,¹³ but here, again, the question did not fall to be decided.

We have accordingly to approach the problem unassisted by authority. The same cannot, however, be said of the meaning which we should attribute to the word "intends" in the context in which it appears in section 30 (1) (f) of the Act. Asquith L.J. in *Cunliffe v. Goodman*¹⁴ examined the precise signification of this word in connexion with the provisions of section 18 (1) of the Landlord and Tenant Act, 1927. I do not at the moment cite from this classic judgment; it is enough to note that, in the Lord Justice's view, "intend" imports a fixed and settled, as distinct from a provisional, purpose. The word "intend" does not in fact appear in section 18 (1) of the Act of 1927, but the late Lord Asquith's definition of it has been adopted as applicable to its use in section 30 of the Act of 1954: see *Fisher v. Taylors Furnishing Stores Ltd.*,¹⁵ *Reohorn v. Barry Corporation*¹⁶ and *Fleet Electrics Ltd. v. Jacey Investments Ltd.*¹⁷ It is accordingly quite clear, as I think, that, if a lessor is to succeed in establishing the ground of opposition upon which the landlords rely in the present case, he must satisfy the court, when the tenant's application is before it, that his intention is of the quality which Asquith L.J. described; and, indeed, that such intention is reasonably capable of being carried into effect. But is it also necessary that he should be able to satisfy the court that an intention of this character was present to his mind when he served upon the tenant a notice that he would oppose an application for a new tenancy? If the language of the Act unequivocally imposes this requirement, then effect must, of course, be given to it, even though the result might be, in some cases, both unexpected and inconvenient. On the other hand, if the intention of Parliament

¹² [1955] 2 Q.B. 636, 646; [1955] 2 All E.R. 875.

¹³ [1956] 1 W.L.R. 678, 689.

¹⁴ [1950] 2 K.B. 237, 253, 254; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

¹⁵ [1956] 2 Q.B. 78.

¹⁶ [1956] 1 W.L.R. 845.

¹⁷ [1956] 1 W.L.R. 1027.

be expressed ambiguously, inconvenience or harshness might well afford a guide to its discovery. It cannot be said, in my judgment, that the legislature has made it plain that the intention of a landlord to demolish or reconstruct demised premises on the termination of the tenancy must be shown to have existed when he serves a counter-notice under section 26 (6) of the Act or, indeed, at any other time prior to the hearing of the application to the court. Section 31 (1) shows, in my opinion, beyond question that the intention must exist at the hearing; for it would be nihil ad rem for a landlord to establish to the satisfaction of the court that he had intended some weeks or months previously to demolish or reconstruct on the termination of the tenancy if, in fact, he had abandoned that intention in the interval. But the additional requirement that an earlier intention, in the strict sense of the word, must also be established cannot be clearly derived, in my judgment, from the statutory language used which, if it imposes the requirement at all, does so in an equivocal and ambiguous manner. Accordingly, it is permissible to inquire whether the requirement would, on the one hand, be of advantage to the tenant and, on the other hand, would or might result in hardship or inconvenience to the landlord; for if it would be a disadvantage to the landlord without securing any corresponding benefit to the tenant, it is surely a legitimate inference that the legislature did not intend to impose it.

On this aspect of the matter, it is desirable to examine somewhat further than I have so far done the interpretation that authority, which is binding upon us, has placed upon the word "intends" in section 30 (1) (f); for if Parliament envisaged that a landlord should intend, at two separate points of time, to reconstruct, it could hardly be suggested, in the absence of clear language to that effect, that there could be a variation in his state of mind at each point respectively—the requisite ingredients of intention must be present on both occasions. What, then, are these ingredients? In order to answer this, it is convenient in the first place to quote a few passages from the judgment of Asquith L.J. in *Cunliffe v. Goodman*,¹⁸ for, as I have already said, the word "intends" in section 30 (1) (f) falls to be construed in accordance with the Lord Justice's observations. "If the plaintiff," he said, "did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was no

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¹⁸ [1950] 2 K.B. 237, 253, 254.

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“evidence of a positive ‘intention’, or that the word ‘intention’ was incapable as a matter of construction of applying to any thing so tentative, and so indefinite. An ‘intention’ to my mind connotes a state of affairs which the party ‘intending’—I will call him X—does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. . . . If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X ‘intended’ that result. . . . Not merely is the term ‘intention’ unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while. A purpose so qualified and suspended does not in my view amount to an ‘intention’ or ‘decision’ within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.” Then at the end of his judgment, the Lord Justice made his oft-quoted remark with reference to moving out of the zone of contemplation into the valley of decision.

I need, I think, make only one further citation. In *Fisher v. Taylors Furnishing Stores Ltd.*¹⁹ Denning L.J. said, with reference to section 30 (1) (f): “the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed. . . . It must be remembered that if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention.”

If, then, landlords who rely on section 30 (1) (f) have to prove that they had an intention to reconstruct or demolish when they serve counter-notices upon their tenants, it will be of no avail for them to show that at that time they entertained a provisional or conditional intention; no intention will suffice that fails to conform to the criterion established by these judicial utterances. It appears to me that this uncompromising view of

¹⁹ [1956] 2 Q.B. 78, 84.

the landlord's position is open to considerable and grave objection. In the first place I am unable for myself to see, and Mr. Blundell was unable satisfactorily to explain, in what way it furthers a tenant's legitimate interests or affords him necessary protection that a landlord should have formed an inflexible and settled intention at the time when the counter-notice is served; or in what manner those interests would be prejudiced, or the tenant left unprotected, if at that time the landlord had formed no more than a provisional or qualified intention to reconstruct or demolish when the tenancy came to an end, or, indeed, had formed no intention about it one way or the other. A landlord who wishes to oppose his tenant's application for a new tenancy is bound by section 30 (1) to state in his counter-notice which of the statutory grounds of opposition he intends to rely upon. The matter will ultimately come before the court and it is obviously right that the tenant should know in advance what is the case that he will have to meet at the hearing. It is, in my judgment, the object of the counter-notice that the tenant should be given this information, but, in my opinion, the counter-notice has no further or other object. It is, I think, intended to be in the nature of a pleading and its function, as in the case of all pleadings, is to prevent the other party to the issue from being taken by surprise when the matter comes before the judge. Why the interests of justice should further require that the landlord's intention must be shown to have been a definite and settled intention at the time when the counter-notice is served, or why the tenant should be entitled to a new tenancy unless such an intention can be established, I find, for my part, difficult to comprehend. I am unable, therefore, to conclude that it was for any reason connected with the interests or protection of tenants that the suggested obligation was imposed by the Act upon landlords, assuming that it was imposed at all.

The next question for consideration is whether the suggested requirement would lead to hardship or inconvenience on the part of a landlord. That it might very well be open to abuse at the instance of an unscrupulous tenant is reasonably plain, when it is remembered that a landlord's counter-notice under section 26 (6), if given at all, must be given within two months of the making of a tenant's request; for a tenant who deliberately put in his request when he knew that, for reasons of illness or otherwise, his landlord would be unable to form the requisite intention for a considerable time to come could deprive him at the outset of all hope of successful opposition. Further than this, however,

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the suggested requirement might well put landlords in many cases into a quite impossible position. It is provided by section 26 (2) of the Act that "a tenant's request for a new tenancy shall be "for a tenancy beginning with such date, not more than twelve "nor less than six months after the making of the request, as "may be specified therein." If a tenant requests a new tenancy beginning 12 months later, the landlord would, if the tenants' argument is accepted, have to come to a fixed and definite decision at least 10 months in advance of the date when he could put that decision into effect. If his intention at that time to reconstruct was conditional upon his being able to raise the necessary finance, or upon the building prices or cost of labour that might prevail 10 months later, that would not suffice; for a conditional or provisional intention is not enough. In cases to which section 31 (2) applies, it might indeed be necessary for a landlord to establish that he had formed the requisite intention a great deal longer than 10 months previously to his being able to obtain possession of the demised premises; and indeed, it seems to me, that the provisions of this subsection are in other ways difficult to reconcile with the tenants' contention.

For the above reasons, I am unable to accept the suggestion that a landlord cannot rely on section 30 (1) (f), unless he can establish to the satisfaction of the court that he entertained, at the date of his counter-notice, a settled and fixed intention to demolish or reconstruct at the termination of the current tenancy. It is to be observed that under sections 4 and 12 of the Act of 1954 a landlord who desires to terminate a tenancy to which Part I of the Act applies, in order to reconstruct the premises, need only state in his notice that he "proposes" so to do; and it is not clear to me why a fixed intention at the date of the notice should be required under Part II of the Act whilst a bare proposal is sufficient under Part I.

As alternative to the date of the landlord's counter-notice it has been suggested that he must at least have formed an intention of the requisite quality by the time he puts in his answer, if the tenant's application is to the county court, or by the time that the originating summons is before the master, if the application is appropriate to and is brought in the High Court. Whilst appreciating the attractiveness of the suggestion, I do not for myself find sufficient in the Act to support it. Moreover, the procedural machinery for these applications, whether in the county court or in the High Court, had not, for obvious reasons, been established or defined when the Act of 1954 passed into law.

Further considerations which are relevant to this suggestion are involved in the question, which I must now consider, whether the landlord must have formed the necessary intention under section 30 (1) (f) by the time when the tenant's application is called on for hearing before the judge or whether he can succeed in his opposition provided that such intention becomes established in his mind at any time previous to the making of the order. As to this, the court is precluded (see sections 31 (1) and 37 (1) of the Act) from making an order for the grant of a new tenancy if a landlord "establishes any of those grounds"—that is to say, the grounds specified in section 30 (1)—"to the satisfaction of the court." On that language it appears to me that it is open to a landlord, who rests his opposition on section 30 (1) (f), to prove that he has the intention therein mentioned at any stage of the hearing and whilst the court is still seised of the matter. The tenant's application is before the judge right down to the time when the court divests itself of further jurisdiction by making an order allowing or dismissing the application, as the case may be. In the face of the prohibition clearly imposed by section 31 (1), I cannot think that it is open to the court to make an order for a new tenancy if it has become satisfied, before the time has come for the making of the order, that the requisite intention exists in the landlord's mind. The intention must, however, be not only fixed and definite, but also genuine and not colourable (*Fisher v. Taylors Furnishing Stores Ltd.*²⁰); and it may very well be that a landlord would find it no easy matter to persuade the judge of the genuineness of an intention at which he had not firmly arrived until after the hearing of the tenant's application had begun. The landlord would, indeed, encounter a similar difficulty, though in less degree, if it transpired that he had formed no definite intention to reconstruct when he put in his answer to the proceedings. In other words, the belatedness of a landlord's intention would be highly relevant to its genuineness but, provided that it exists by the time the hearing is closed, it is not, in my judgment, fatal to him in point of time.

I am, for the above reasons, unable to agree with Danckwerts J.'s conclusion that the landlords cannot succeed by reason of the fact that they had not formed the requisite intention when they served their counter-notice on the tenants. Mr. Blundell sought to support that view by a reference to section 30 (1), paragraphs (a) to (e), and said that it is clear that, if a landlord desires to rely on any of the grounds therein mentioned, he must

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establish that they existed at the date of the counter-notice. It is, of course, very unlikely that a landlord would rely on any of these grounds of opposition unless they in fact existed when he served his counter-notice, but I should have thought it reasonably plain that subsequent events would be relevant and admissible in relation to the tenant's repairing obligations, payments of rent and so on. In any event, paragraph (f) gives rise, in my judgment, to considerations peculiar to itself, whatever the position may be under paragraphs (a) to (e).

It remains to consider whether, on the footing that the resolution passed by the directors of the landlord company on April 23, 1956, could constitute an intention by the landlords to reconstruct, notwithstanding that it was so belated, the intention embodied therein, and supported by the offer of an undertaking to the court, was a sufficiently "settled" intention and whether it also possessed the requisite quality of genuineness. As to whether the intention in fact existed, the judge said²¹: "The works will not be carried out unless they acquire possession against the request and application of the tenants for a new tenancy. The landlords have stated this frankly, and the resolution of April 23, 1956, is expressed in those terms. Therefore the intention, if it existed or exists, is conditional upon the tenants' application being defeated and possession being obtained forthwith by the landlords. It is questionable whether an intention which is dependent upon a condition of this kind, which is not within the sole volition of the landlords, is such a firm and settled intention as is required by the terms of paragraph (f)."

I do not for myself share the doubt expressed by the judge; for inasmuch as no demolitions and few reconstructions could ever be carried out by landlords unless they obtained possession of the premises concerned, paragraph (f) would be rendered almost nugatory as a ground of effective opposition. Whether, apart from the doubt which the judge indicated upon that point, he would have held that the landlords had established a sufficiently settled intention, I am not altogether sure, and it does not seem to me that we have the necessary material before us to arrive at a satisfactory conclusion upon the matter ourselves. Apart, however, from the fixity of the intention, the question of its genuineness also has to be considered. That an intention must not only be fixed and definite but must also be a genuine

²¹ [1956] 1 W.L.R. 678, 688.

intention sufficiently appears from the cases to which I have earlier referred; and the judgment of Parker L.J. in *Fisher's* case²² is of particular assistance upon this aspect. If a man establishes to the satisfaction of the court that he has arrived at an unqualified decision to do some particular act, it might be thought that the very fixity of his determination was sufficient evidence of its genuineness. In cases such as the present, however, where a landlord is unable to rely on section 30 (1) (g) of the Act and founds himself on subsection (1) (f), this is not necessarily so. Such a landlord might form an entirely definite intention to reconstruct the demised premises if he could obtain possession of them for himself; but if, for example, such reconstruction were shown to be unnecessary for the landlord's own residential occupation, or for the purposes of his business, his decision to carry out the work would presumably be regarded by the court as a mere blind, formed only for the purpose of overcoming his inability to rely on paragraph (g). In view of the judge's decision that the resolution of April 23 was too late, it was not necessary for him to arrive at any definite conclusion upon this question, and I am not satisfied that he did so. It is true that he said²³ that "the intention to reconstruct in the present case is obviously wholly ancillary to the object of the landlords to get possession of the property for their business"; but, if that was intended by the judge to be a definite finding that the resolution was, in truth, a sham, it was unnecessary for him to proceed to what he described as "an even more important question," namely, the relevant time for the formation of the relevant intention. In any case, however, I am not at all sure that the judge was considering whether the intention, which was evinced by the April resolution, was a "genuine" intention in the sense which I have indicated; for an intention may still be genuine, as well as fixed and settled, even although it is ancillary to some other intention.

I would accordingly allow the appeal and remit the case to Danckwerts J. for his determination whether the intention at which the landlords arrived on April 23, 1956, possessed the necessary qualities of fixity and genuineness. In the event of his arriving at a decision adverse to the landlords and ordering that a new tenancy be granted to the tenants, I agree with Birkett L.J. that, for the reasons which he has stated, such new tenancy should be for a term of five, and not 14, years.

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LORD EVERSHERD M.R. I have the misfortune upon the difficult question of construction of the Landlord and Tenant Act, 1954 (which has been the main subject of debate on this appeal), to differ from the conclusion of my brethren; for I agree with Danckwerts J. in thinking that the "relevant date" (as it has been called), that is, the date by reference to which the landlord, who has opposed the tenant's application for a new tenancy on the ground specified in paragraph (f) of section 30 (1) of the Act, must prove the existence of the alleged intention, is the date of the landlord's notice given, in such a case as the present, under section 26 (6). Alternatively, I think that the "relevant date" should be taken as the date upon which (according to the relevant practice or procedure in the High Court or the county court, as the case may be) the landlord must state, in the proceedings instituted by the tenant, whether he does or does not oppose the relief which the tenant seeks. In my judgment, with all respect to the contrary opinion of my brethren, the proposition that a landlord can form the requisite intention at any time before judgment is given in the High Court or the county court (for I do not understand that the proposition would extend the time until judgment in this court) is irrational and stultifies the elaborate machinery otherwise provided by the Act; and ought, accordingly, to be rejected.

I can state my reasons shortly for the view which I have formed. But, first, I would like to say something of the language used by Asquith L.J. in *Cunliffe v. Goodman*,²⁴ which has since been applied by way of exposition of the word "intends" in section 30 (1) (f), for example, in *Reohorn v. Barry Corporation*²⁵ and *Fleet Electrics Ltd. v. Jacey Investments Ltd.*²⁶ The Lord Justice was not concerned to construe a section of an Act of Parliament in which the word "intend" or "intention" in fact appeared at all. He was merely illustrating in characteristically forceful language what these words, as ordinary English words in an ordinary context, imported. More particularly, he was showing how the word "intention" in such a context differed in signification from mere idea or aspiration. In the *Reohorn* case²⁷ the Barry Corporation had expressed itself as desirous that the land there in question used as a car park should be developed: but in order that such a proposal should be carried into effect by the corporation, it would be necessary for them (among many other things) to take steps to obtain authority to

²⁴ [1950] 2 K.B. 237, 253, 254.²⁵ [1956] 1 W.L.R. 1027.²⁵ [1956] 1 W.L.R. 845.²⁷ [1956] 1 W.L.R. 845.

raise a very large capital sum. It was proved that none of these steps had been taken, nor was it clear by any means what the result of taking them would be. In those circumstances—and there were others of the same kind—the court invoked Asquith L.J.'s language by way of support and emphasis for the view that the proposition for development, though favourably entertained by the Barry Corporation, could not fairly be said to have been the subject of an "intention," that is, something which they could seriously be said to have in truth and fact resolved upon. In my judgment, the adoption of Asquith L.J.'s language by this court in the later cases cannot be treated as having (in effect) substituted for the word "intends" in paragraph (f) (as in paragraph (g)) of the section the words "is 'ready and able,'" so as to impose upon the landlord the onus of proving that, at whatever be the proper date, he has not only finally determined upon the course proposed but has also taken all necessary steps for the satisfaction of any requisite conditions to which the course proposed is subject. The relevant word is "intends," a simple English word of well-understood meaning. The question whether the intention is at the relevant date proved has, in my judgment, to be answered by the ordinary standards of common sense. If there are conditions to which the course proposed is subject, but if the landlord has no reason to suppose that there would be difficulty in their fulfilment, then *prima facie*, in my view, the landlord would not fail to prove intention within the meaning of the section merely because he could not prove, at the date in question, that all steps had been taken to satisfy the conditions. But it might well be otherwise if the course proposed were conditional upon other things being done which were by no means matters of course; for example, the successful raising of large sums of money not presently available to him. In such a case the proposed course, though it might well have been adopted as one to be aimed at and, if possible, attained, could not, or could not easily, be said to be "intended" in the sense of having been finally resolved upon. I have reached the conclusion, after reading the judgments in this court in which Asquith L.J.'s language has been invoked and re-reading my own judgment in the *Fleet Electrics* case,²⁸ that this court is not now bound to construe the word "intends" otherwise than as I have tried to express.

I have spent some time upon this matter, since it is said with force on the landlords' side in the present case that the

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²⁸ [1956] 1 W.L.R. 1027.

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limit of two months after the making of his request by the tenant (which he could make at any time and to suit entirely his own convenience) imposed by section 26 (6) of the Act puts, if the view of the tenants is right, an unreasonable burden on the landlord, if by the time of giving his notice he must have taken all the steps to procure that all conditions could and would be satisfied by him—so unreasonable, indeed, that the court should not, in the absence of clear and compelling language, endorse it. In my judgment, this criticism largely disappears if the word “intends” is given no more than its ordinary meaning.

I turn to the general scheme of this part, Part II, of the Act. Briefly, the scheme is that a tenancy of the kind to which Part II of the Act applies continues (after the date of its expiry under the contract of tenancy) indefinitely until the requisite step is taken either by the landlord to put an end to it or by the tenant to obtain a new tenancy for a fixed term. The case of the tenant determining his tenancy in order to abandon his occupation of the property can, for present purposes, be omitted from consideration. In the former case, the landlord must (see section 25 (6)) specify in his notice of determination on which of the grounds set forth in section 30 (1) he “would” rely by way of opposition to the tenant’s application to the court for a new tenancy, if the tenant is unwilling to comply with the landlord’s notice: for, if he is so unwilling, then his inevitable course is to make application for a new tenancy. In the latter case (that is, the case of the tenant taking the first step to put an end to the existing or continuing tenancy by requesting the grant of a new term) the landlord must (if unwilling on his part to grant the new term requested) by his notice in answer (see section 26 (6)) similarly specify, in the event of the tenant’s application to the court, which of the grounds in section 30 (1) he “will” invoke. It is not, as I understand, in dispute that, for the purpose of determining the “relevant date,” there is no difference between a landlord’s notice under section 25 and a landlord’s notice under section 26. But it is to be observed that, in the case where the landlord makes the first move, the practical effect of the requirement as to his notice is that the ground selected from section 30 (1) is made the basis for the exercise of his power of determination. Moreover, it is not (according to the scheme of the Act, whatever may be, in nine cases out of ten, the likely course of events) certain that the tenant will in fact make any application to the court for a new tenancy at all. In other words, the

first and obvious purpose of the landlord's notice is, in my judgment, clearly to indicate to the tenant what he, the landlord, says his case would be in the event of court proceedings. In face of that notice, the tenant makes up his mind whether he will incur the risk of invoking the court's jurisdiction with the obvious possibility that, if he loses, he will have to pay the costs. It is said that the specification of the selected ground or grounds by the landlord's notice is a kind of pleading. But, if so, why is it necessary for him to make his final selection before, and it may be some considerable time before, proceedings of any kind are initiated? If all that was intended by these sections was to indicate the grounds upon which, at the hearing, a landlord should be enabled successfully to resist the tenant's application, it would have been both natural and simple merely to provide that in case the tenant applied for a new tenancy (either upon his own initiative or by way of answer to his landlord's notice to quit) the court should reject such application, if the landlord established at the hearing any one of the grounds set out in section 30 (1) to the court's satisfaction. I agree, of course, that the question must ultimately depend upon the language of section 30 (1) itself, properly interpreted in its context. But to my mind the elaborate provisions of these sections, which require the exclusive selection of one or more specific grounds by the landlord at this early stage, point very strongly indeed to the conclusion that the landlord is bound at this stage to assert what his case then is; and that what he must thereafter establish is the truth of the case so asserted. In my judgment, it is neither sensible nor logical to require that the landlord will make a kind of proleptic choice of the grounds he will at some future date, perhaps months ahead, rely upon, hoping that in the meantime the facts will have occurred which will support his selection.

Reference was made in the course of the argument to the somewhat corresponding provisions in Part I of the Act relating to tenancies of dwelling-houses to which the provisions of the Rent Acts would have applied had not the rent been below the level requisite for their application. Section 12 of the Act specifies the grounds upon which a landlord may apply to the court for possession of the premises comprised in such a tenancy. The first ground (paragraph (a) of subsection (1)) is that for the purposes of redevelopment the landlord "proposes to demolish "or reconstruct" the premises; second (paragraph (b) of the same subsection), the landlord may rely upon any of the grounds specified in the Third Schedule to the Act, which correspond, with

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necessary modifications, to the grounds on which a court may make an order for possession under the Rent Acts. In my judgment, no assistance can be derived towards the solution of the present problem from the language of section 12. That language is, of course, quite different from the language in section 30 (1). More important, the section is dealing in these cases with the right of a landlord, otherwise entitled according to the common law to possession, to apply to the court for an order for possession. Thus, paragraph (b) above mentioned brings in all the grounds which, in similar circumstances, may be invoked by a landlord applying for possession under the Rent Acts: and there is no doubt that, generally speaking, it suffices for the landlord to establish one or other of such grounds as existing at the date of the hearing. By analogy it may suffice, though it is unnecessary in the present case to decide the point, that the "proposal" indicated in paragraph (a) is established as existing at any time before judgment. But the scheme of section 12 and the other material sections in Part I seems to me to be substantially different from the scheme of Part II. In the former, the Act is only concerned to specify the limitations upon the landlord's right, upon his starting to make application to the court, to obtain an order for possession to which, apart from the legislation, he would otherwise be entitled.

It was strenuously argued for the landlords that, according to the natural and grammatical construction of the notice which the landlord must give (in a form, be it observed, prescribed by the statute), the selected grounds alleged need have no existence at any earlier date than the hearing. I am, for my part, wholly unable to agree. My brother Romer has set out at the beginning of his judgment the form of the notice served in the present case, which I do not repeat. If I am told by my landlord that he will oppose any application that I may make on the ground that on the termination of my tenancy he "intends to reconstruct" the demised premises, I confess that I should, myself, assume without hesitation that he so intended when he gave me the notice.

In my judgment, the effect of the language of section 30 (1) is the same. Seven grounds are specified in paragraphs (a) to (g) inclusive. The question with which we are concerned arises equally under paragraphs (f) and (g): but it is, in my judgment, tolerably clear that the state of facts alleged, which forms the basis of each of the remaining five paragraphs, is a state of facts which must exist at the date of the notice itself, or at least at a date long

before the hearing or its conclusion. I do not, of course, doubt that the question whether the tenant ought or ought not to be granted a new tenancy (see paragraphs (a), (b) and (c)) is one that must and can only be determined at the hearing: and I do not say that events occurring up to the date of the hearing are irrelevant to the exercise of the court's powers. But, in my judgment, the state of repair of the building, the persistent delay in payment of rent, the breaches by the tenant of his obligations under the tenancy, upon the basis of which the court is to be invited by the landlord to say that no new tenancy ought to be granted, must sensibly be referable to the date of the notice which alleges them—or at least to the date of the landlord's actual opposition to the tenant's application. It seems to me inconceivable to suppose that Parliament contemplated that a landlord would specify as the ground on which he would oppose the tenant's application (if made) a state of affairs which not only then did not exist, but which would be found to have come into existence for the first time during the hearing itself. Paragraph (d) appears to me to be a still stronger example of the same general conclusion. Applying the language of this paragraph to the form of the statutory notice, the landlord says thereby that he would oppose an application by the tenant on the ground that "he has offered and is willing to "provide" alternative accommodation. As a matter of English, it is, in my view, impossible and quite illegitimate to translate the words "has offered" into "will at the date of the hearing have "offered." Counsel for the tenants did not in the end (as I understood him) argue upon this paragraph to the contrary.

If I am right in my interpretation of paragraphs (a) to (e) inclusive, then corresponding effect ought, in my judgment, to be given to paragraphs (f) and (g); for it would be in the highest degree unlikely that there should be a different "relevant date" contemplated by Parliament for these two paragraphs alone. The view which I take is also, to my mind, more in conformity with the general scheme of the section and the elaborate provisions as to notices to which I have earlier referred and which I do not now repeat. Nor does it seem to me that any difficulty is created by the use of the words "would" and "will" in sections 25 (6) and 26 (6) respectively, or by the use of the word "establishes" in section 31 (1) on which the landlords somewhat relied. Whatever is the landlord's case, it is not in doubt that he must "establish" it at the hearing. There is no other possible occasion on which he can do so. The question is: what is the case, what are the facts, which he must then prove? Similarly, the words "would"

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and "will" are, in my judgment, used, and appropriately used (as sufficiently appears from the form of the notice itself), to indicate what, on a future occasion, the landlord will state his case to be. The question remains: what is that case?

But if I am wrong in thinking that the date of the notice is the relevant date, then, alternatively, I would take the date to be the date when, after the launching of his application by the tenant, the landlord must state whether or no he opposes. An application under the Act may be made either in the High Court or in the county court, according to the value of the property in question. In the former case, the procedure will be governed by the terms of Ord. 53*b*, and in the latter by the County Court Rules: see particularly Ord. 40, r. 8. In each case the landlord will have, at an early stage in the proceedings, to state whether he opposes the application. In the present case he did so, pursuant to rule 5 (3) of Ord. 53*b*, by filing an affidavit. In each case he will be limited to an opposition based on the notice previously given.

It may be said that the words "would" and "will" in sections 25 (6) and 26 (6) lend, according to their natural sense, some support to this view. The view appears, in effect, to have been assumed by Parker L.J. in the *Reohorn* case,²⁹ though it is fair to say that the point was not necessary for his decision and not directly considered by him. He said³⁰: "In the above I "have assumed that the relevant time to be considered is the "time of the application." The alternative view has, also, the practical advantage, as regards a case under (f) and, perhaps, (g), of giving the landlord a longer time in which finally to make up his mind and get his tackle in order.

It cannot be doubted that, whatever be the correct answer to the present problem, some difficulties and anomalies may remain. Notwithstanding the elaboration of the relevant sections, Parliament appears not to have considered exhaustively their practical or procedural implications. Thus, it was strongly contended that only one point of time, on any view, appears to be contemplated as the point of time at which the alleged intention must be proved to exist. Difficulties arise particularly under paragraph (d) if the words "has offered" and "is willing" are referable, as *prima facie* on the language they are, to the same point of time. These difficulties were not found capable of satisfactory solution during the arguments, as I understood them, and may on some future occasion have to be solved by the court.

²⁹ [1956] 1 W.L.R. 845.³⁰ *Ibid.* 857.

But it is said that the difficulties are far greater upon the view, or either of the views, which commend themselves to me than upon the view which has appealed to my brethren. It is said, indeed, that the results of the former would work real hardship upon the landlord, with no compensating advantages to the tenant. With all possible respect, I am unable to agree. I have already given my reasons for not attributing to the language of Asquith L.J. the far-reaching effect that might, I agree, be an undue embarrassment to the landlord. It has to be remembered what is the subject-matter to which it is contemplated that this Part of the Act applies, namely, a tenancy which is liable already to have expired according to its terms, and which, unless some step is taken by one side or the other, will automatically and indefinitely continue. If, in such cases, a landlord contemplates a reconstruction, or substantial reconstruction, of the premises either on the expiry of the term or at some later date, it seems to me, as a practical matter, in the highest degree unlikely that he will not have given, at the least, very serious consideration to the matter before he is stirred to activity for the first time by the tenant's request for a new tenancy. Then it is said that, if the view of the judge is right, it will suffice that the landlord should have in fact formed the fixed intention at the date of his notice (or, alternatively, of his opposition) even though he has wholly changed or abandoned it by the date of the hearing: for the terms of section 31 (1) are categorical—if the landlord establishes a ground of opposition, then the court cannot make any order in the tenant's favour. This is, no doubt, at first sight a serious consideration; but, in my judgment, the practical answer is that the court would be in the highest degree unlikely to find, as a fact, that the landlord had formed bona fide a fixed and settled intention at the earlier date, if it appeared that he no longer entertained it at the hearing. And I observe that the tenant would have no remedy, on the landlords' view, if the landlord bona fide changed his intention immediately after the judgment.

But these difficulties must be set against the consequences of the opposite view. The result of that view must be that it would be open to a landlord to specify any or all of the grounds in section 30 (1) in his notice (and as a matter of prudence he might formally specify them all) and the tenant would have, in deciding whether to make application to the court, to take the risk of not knowing what case to meet or even of having any case to meet until the matter had (as in the present case) been already for some days before the trial judge. One of the matters of fact which

C. A.

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paragraph (f) involves is the question whether the reconstruction proposed is substantial; another, whether possession is reasonably required for it. Both these questions are matters upon which, plainly, the tenant would require, and should be given, opportunity for investigation and, possibly, expert advice. But this opportunity would be denied him, if the landlord could wait until the trial opened before his proposals were formulated or disclosed at all. For reasons which I do not repeat, such a conclusion seems to me inconsistent with the scheme of the relevant sections, the elaborate provisions of which are thereby rendered largely otiose or futile. The Act is, after all (as the terms of its long title expressly indicate), one for the benefit of tenants. I have, for my part, been unable to accept as conformable to the purpose and language of the Act, the result in the present case which might enable the landlords to defeat the tenants' application on a ground which was set out in their notice of August, 1955, but which was shown to have no existence in fact until (at best) the case had been for several days before the judge eight months later.

With every respect, therefore, to the contrary opinions of Birkett and Romer L.JJ., I would, if the matter rested with me, dismiss the appeal on this ground. But, having regard to the judgments of the majority of the court, it becomes also necessary for us to consider the other questions raised. Upon all these other matters (including that of the length of the tenancy, if granted), I agree entirely with the judgments which my brethren have delivered, and I do not desire to add any reasons of my own. In the circumstances the order must be as formulated by Romer L.J. at the conclusion of his judgment, namely, that the appeal should be allowed and the case remitted to Danckwerts J. "for his determination whether the intention at which the company arrived on April 23, 1956, possessed the necessary qualities of fixity and genuineness."

Appeal allowed.

Solicitors: *Clifford-Turner & Co.; Ward, Bowie & Co. for Booth & Co., Leeds.*

B. A. B.

In re SCULLARD, DECD.
SMITH *v.* BROCK AND OTHERS.

1956
Nov. 20.

Danckwerts J.

[1956 S. No. 239.]

Conflict of Laws—Domicile—Change—Death of husband—Husband and wife living apart—Wife residing in Guernsey—Expressed intention during husband's lifetime to reside there permanently—Husband's domicile English—Predecease of husband—Wife unaware of husband's death—No intention expressed after his death—Domicile of choice in Guernsey at date of her death.

The testatrix left her husband in 1908 and never lived with him again. He had an English domicile, which he retained until his death on February 4, 1955. In 1946 or 1947 the testatrix, having lived in various places, went to live in Guernsey, with the object of being near her daughter. At that time she expressed an intention of residing in Guernsey until her death. Her personal property was removed to Guernsey, and her realizable securities were sold and reinvested in Bearer Bonds or War Stock, and taken to Guernsey. In 1949 a cottage was purchased there for her occupation with certain trust funds.

She died on March 19, 1955, surviving her husband by some six weeks, but never having learnt of his death. She expressed no further intention after his death of continuing to live permanently in Guernsey, and the medical evidence was that during the last two weeks of her life she was incapable of expressing any intention.

On a summons to have determined the question whether, at the date of her death, she was domiciled in Guernsey:—

Held, that it was not necessary for any further act on the part of the testatrix after the death of her husband to show her continued intention to reside permanently in Guernsey, as it would be presumed that her previously expressed intention continued until her death; and she had, accordingly, a domicile of choice in Guernsey at the date of her death.

In re Cooke's Trusts (1887) 56 L.T. 737; 3 T.L.R. 558 applied.

In the Estate of Wallach (1950) 66 T.L.R. (Pt. 1) 132; [1950] 1 All E.R. 199 distinguished.

ADJOURNED SUMMONS.

The question for the determination of the court was whether a testatrix, Ethel Mary Scullard, was at the date of her death on March 19, 1955, domiciled in England or in the island of Guernsey.

The will of the testatrix was made on March 8, 1937. She made two codicils, on February 25, 1950, and on October 30, 1950. In the will she described herself as of "White Lodge, Nacking-ton, Canterbury, in the County of Kent," in the first codicil

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she described herself as "Ethel Mary Scullard," her married name, "more usually known as Ethel Mary Scott," which was the name she adopted, "at present residing at Les Buttes, "Torteval, Guernsey, Channel Islands, formerly of White Lodge, "Nackington, Canterbury, in the County of Kent," and in the second codicil described her name and residence in a similar manner. Under the will and codicils her residuary estate was settled on her three children on trusts under which they would not take absolutely. If, however, her domicile were in Guernsey and not in England, the will would be subject to the law of Guernsey, by which one half of the estate would be given absolutely to her three children, and the provisions contained in her will would accordingly be altered.

The testatrix was married once only, on July 1, 1893, to Albert Victor Scullard, who died on February 4, 1955. There were three children of the marriage. It was stated in the affidavit of Mr. Francis Armitage Smith, a solicitor, that the testatrix's husband was born in England of English parents, and that to the best of his knowledge the husband was at all material times up to his death both resident and domiciled in England. The testatrix had been separated from her husband for many years at the date of his death, and for upwards of nine years before her death had resided continuously in the island of Guernsey. She left certain real estate in South Africa, but no real estate in England or Guernsey. She left free personal estate in England to the value of about £7,000 net, and personal estate in Guernsey of £9,000 gross, £7,500 net.

Further relevant details of the life of the testatrix were as follows: About 1908 the testatrix and her husband and children were living in Cornwall. In that year the testatrix left her husband, taking the children with her, and never again resided with him. She assumed the name of "Scott," and the children were brought up under that name. Save that thereafter she made her husband a cash allowance through her solicitors, she had no further communication with him, nor did she make any attempt to find out his address. She moved to Guernsey in 1910 and remained there until about 1921, when she went to Canada. At that date the defendant, Albert Holroyde Scott, one of her sons, and the defendant, Edna Mary Brock, her daughter and her husband (who was a Guernsey man) were living in Canada. In or about 1930 she returned to England because of the poor health of her other son, Denys Parker Scott,

who required constant medical care. She remained in England until 1946 or 1947, when she again returned to Guernsey. Her object in moving was to be near her daughter, Edna Mary Brock (who had returned to Guernsey with her husband about 1933). At that time she expressed the intention of spending the rest of her days in Guernsey. All her personal possessions and furniture were moved to Guernsey, and all her realizable investments were sold and reinvested in Bearer Bonds or $3\frac{1}{2}$ per cent. War Stock and taken to Guernsey.

The trustees of two settled funds to which she was entitled for life were informed, and the trust investments were so far as possible invested in investments which would be exempt from United Kingdom death duties on the death of a person domiciled out of the United Kingdom. Although residence might be sufficient to enable her to avoid income tax, she would have to be domiciled outside the United Kingdom in order to avoid estate duty on her personal estate. Originally the testatrix rented a house in Guernsey, but in December, 1949, at her request a cottage was purchased for her occupation with part of a sum of £2,000 which she had voluntarily settled upon certain trusts for herself during her life. Thereafter she resided in Guernsey until her death. In 1953 she had an accident in which she broke a thigh, and in October, 1954, she suffered a slight stroke and was removed to hospital. She was not informed of her husband's death on February 4, 1955, and died without knowing of it some six weeks later on March 19, 1955. There was medical evidence indicating that she was about 86 years old when she died, and she retained sufficient possession of her faculties to understand the import of anything she was doing until about two weeks before her death—that was about four weeks after the death of her husband occurred, although she was ignorant of that fact.

Mr. Smith stated in his affidavit: "My firm has acted as solicitors for the testatrix and for members of her family for upwards of 24 years past and I am able to depose to the facts set forth . . . in part from records in the possession of my said firm, in part from statements made by the testatrix herself, and in part from information given to me by the defendant Edna Mary Brock. In particular the intention of the testatrix to spend the rest of her days in Guernsey was expressed by her to me in 1946 and instructions for the alterations of the trustee investments hereinbefore referred to were given by my firm on her behalf."

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Peter Oliver for the plaintiffs, executors of the will of the testatrix.

J. L. Arnold for the children of the testatrix, the first wife of one of the sons, and the children of that marriage. There is evidence that before her illness the testatrix had the intention to make Guernsey her permanent home. She bought a house there and had her personal possessions and furniture brought there. She also sold securities and re-invested the proceeds in Bearer Bonds or War Stock which were taken to Guernsey; an important advantage of that would only be of effect if she were domiciled in Guernsey at the date of her death. There was, moreover, the direct statement of her intention to reside in Guernsey made to her solicitor in 1946.

There is, accordingly, the actual fact of her residence in Guernsey, and evidence from which can be inferred an intention to continue living in Guernsey; there was thus the factum and animus manendi, the only necessary ingredients, as stated in *In re Cooke's Trusts*,¹ for the acquisition of a domicile. That case is relied on to show that the court will infer an intention as to residence from the past, and will, in the absence of any evidence to the contrary during the vital period (i.e., after the husband's death), infer from that evidence an intention to continue such residence. The fact that the testatrix was unaware of her husband's death does not matter.

On the authority of *In re Cooke's Trusts*² the court is asked to hold that, there being evidence before 1955 of an intention on the part of the testatrix to reside permanently in Guernsey, she was at the date of her death domiciled in Guernsey.

G. B. H. Dillon for the son's second wife. The testatrix had an English domicile at the date of her death; if her husband had survived her she would have retained his domicile at her death, and until his death she had no power to change her domicile. The evidence is that she was unaware of his death.

A woman acquires the domicile of her husband on marriage, and during the existence of the marriage her domicile follows that of her husband; on the dissolution of the marriage by death of the husband or by divorce, the power of the wife to acquire a domicile for herself revives, but until she exercises that power her domicile remains that of her husband at the time of the dissolution of the marriage: see Halsbury's Laws of England,

¹ (1887) 56 L.T. 737, 738; 3 T.L.R. 558. ² 56 L.T. 737.

3rd ed., vol. 7, p. 24. That statement covers this case and is a correct statement of the law.

In *In the Estate of Wallach*³ Hodson J. held that a wife who survived her husband by five days retained the English domicile which he had acquired; that was a decision of the Probate Division, but the practice on this sort of question ought not to vary between the two courts.

The wife therefore retains her husband's domicile after his death until she has done some act showing an intention to change it, but until his death she cannot do anything to exercise that power. Since the death of her husband the testatrix has not expressed any intention in respect of her residence in Guernsey.

DANCKWERTS J. This is an unusual and rather interesting case on the question of domicile.

[His Lordship stated the facts and continued:] It is rather strange that there is no affidavit by her daughter, Mrs. Edna Mary Brock, whom one would have supposed would be in a position to say more about the expressed intention of the testatrix than anybody else. The evidence by a doctor and nurse which has been put in, really goes to nothing more than that from the time of her husband's death until about two weeks before her own death, she was capable of understanding and expressing the intention as regards her permanent home or domicile, if in fact she had any such intention. There is, however, no evidence of any expression of intention after the death of her husband on February 4, 1955, and before her own death six weeks later. On the evidence as a whole, I think it right to say that although I criticized the absence of certain affidavits in certain respects, there is sufficient to enable me to come to the conclusion that, at any rate after about 1946 or 1947, the testatrix had formed a definite intention to make Guernsey her permanent home.

The difficulty arises in this way. So long as she was married to her husband, even though she was separated from him as completely as possible short of judicial separation, she could not form an effective intention to change her domicile from that of her husband. In Halsbury's Laws of England (3rd ed., vol. 7, at p. 24) appears the following paragraph headed "Married Women": "A woman acquires the domicile of her husband on marriage, and during the existence of the marriage the domicile of the wife follows that of the husband. Even a

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³ (1950) 66 T.L.R. (Pt. 1) 132; [1950] 1 All E.R. 199.

1956	“decree of judicial separation does not render the wife capable
SCULLARD,	“of acquiring a separate domicile, for such a decree does not
DECD.,	“affect her status as wife. The wife acquires the husband’s
<i>In re.</i>	“domicile if she lives with him in the country of his domicile,
SMITH	“not only by construction of law but also as a matter of fact.
v.	“On the dissolution of the marriage by the death of the husband,
BROCK.	“or by divorce a vinculo, the power of the wife to acquire a
Danckwerts J.	“domicile for herself revives, and she is free again to exercise
	“her own choice of domicile for herself and her infant children
	“in her custody; but until she exercises this power her domicile
	“remains that of the husband at the time the marriage was
	“dissolved.”

It is argued by Mr. Dillon, on behalf of the defendant who wishes to establish that the testatrix’s domicile was English, that as she did not express any intention during the short period after her husband’s death she could not have acquired a domicile in Guernsey, and, therefore, her domicile remains that of her husband, namely, in England.

I have been referred to two cases. One is the decision of Stirling J. in *In re Cooke’s Trusts*,¹ which was decided in 1887. The facts in that case were as follows: “An Englishwoman, while still an infant, married in France a Frenchman, from whom she was afterwards separated. There were children of this marriage. Subsequently, believing her husband to be dead, she went through the ceremony of marriage with an Englishman, and went with him, in 1853, to live in New South Wales”—it appears from the facts set out in the case that that ceremony was about eight years after she had parted from her French husband—“where she remained until her death in 1879. In 1877 her husband died [apparently she did not know of that] and in 1878 she made a will disposing of her property as if she were an Englishwoman:—*Held*, that she was, at her death, domiciled in New South Wales, and the disposition made by her will was valid.”

Stirling J. said²: “If either of the contentions put forward on behalf of the children prevailed, the viscountess would have been unable to dispose of part (a) of the property [(a) is a note as to the part of the property it should be]. Unquestionably, the viscountess by her marriage acquired a French domicile, and so long as the husband, the viscount, lived, could not acquire any other. The viscount died in 1877, and from that time until

¹ (1887) 56 L.T. 737; 3 T.L.R. 558. ² 56 L.T. 738.

“ her death she resided in New South Wales, as in fact she had
 “ done for many years previously. That she went to that country
 “ and resided there with the intention of making it her permanent
 “ home is not disputed, and there is no reason to doubt that that
 “ intention continued during the period which elapsed between
 “ the death of the viscount in 1877 and her own death in 1879.
 “ There existed, therefore, during that period the two elements
 “ necessary for the acquisition of a domicile of choice, namely,
 “ actual residence and intention permanently to reside. But it
 “ is said, notwithstanding that, that a new domicile was not
 “ acquired. It was contended that for that purpose there must
 “ be an election of domicile, and that the viscountess never
 “ elected; that she went to New South Wales and lived there
 “ because she believed herself to be the petitioner’s wife, and
 “ exercised no choice in the matter. That contention appears to
 “ me to be well founded to this extent, that no doubt the motive
 “ for her residence was the desire of the viscountess to enjoy the
 “ companionship of the petitioner, whom she believed to be her
 “ husband, but at the same time I think that the existence of
 “ any particular motive is immaterial except so far as it throws
 “ light on the intention of the person as regards residence. The
 “ motive in the present case is entirely consistent with an inten-
 “ tion to permanently reside in New South Wales, and that being
 “ so, I am of opinion that there exist the only ingredients neces-
 “ sary for the acquisition of a domicile, namely, the factum and
 “ the animus manendi, and consequently that the viscountess
 “ was, at the time of her death, domiciled in New South Wales.
 “ Even if not so, still it appears to me that the domicile of the
 “ viscountess at the time of her death was not French.” Then
 he said³: “ Her French domicile was an acquired one, and
 “ consequently capable of being abandoned without the necessity
 “ of acquiring a new domicile of choice.” That is one case
 which, of course, supports the claim of those who state in the
 present case that the testatrix had acquired a domicile of choice
 in Guernsey.

There is, however, the case of *In re Wallach*,⁴ which was
 before Hodson J. in the Probate Division. The facts in that
 case were⁵: “ In 1906 the intestate, a woman, married E. W.
 “ whose domicile of origin was German. In 1943 E. W. died in
 “ England where he had been living since 1939. Five days after

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³ 56 L.T. 739.

⁵ [1950] 1 All E.R. 199.

⁴ (1950) 66 T.L.R. (Pt. 1) 132;

[1950] 1 All E.R. 199.

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“her husband’s death the intestate died. On the trial of an issue to determine the domicile of the deceased, the learned judge found as a fact that E. W. had acquired a domicile of choice in England:—*Held*, a widow retains her late husband’s last domicile until she changes it, and, therefore, the intestate’s domicile was English.” That is a case on which Mr. Dillon relies. Hodson J. said⁶: “In this action, which concerns the estate of Mrs. Lucie Wallach, who died on July 21, 1948, the plaintiff claims to be the lawful second cousin of the deceased, who died domiciled in France or, alternatively, Germany, and, as such, to be one of the persons entitled in accordance with the law of France or Germany to share in her estate. The plaintiff denies that the Treasury Solicitor, the defendant, has an interest in the estate. The Treasury Solicitor, by his defence, denies the allegations as to domicile and the interest of the plaintiff and alleges that the deceased died intestate and domiciled in England, without leaving anyone entitled, by virtue of the Administration of Estates Act, 1925, section 46 (1), to share in her estate, so that the Treasury Solicitor is the only person entitled to succeed to it. On these pleadings an issue was directed to be tried as to the domicile of the deceased.

“The deceased, having been a married woman until five days before her death and being then a widow, according to the accepted principles of English law retains her late husband’s domicile until she changes it: see Dicey’s Conflict of Laws, 6th ed., page 111, which contains the following rule: ‘A widow retains her late husband’s last domicile until she changes it.’ Counsel for the plaintiff, who has argued that this rule is wrong, referred me to a case in the Prerogative Court of Canterbury, *Gout v. Zimmerman*,⁷ the headnote to which reads: ‘A testatrix, born at Smyrna, of Dutch or Russian parents there residing, under the protection of the Dutch Consulate at Smyrna, married to a British subject, and, after his death, continuing to reside during the remainder of her life in the Levant, makes a will, disposing of property in England, in the English form:—*Held*, that her British domicile acquired by marriage had not been changed, nor had her domicile of birth reverted, and the protest to the jurisdiction of the court overruled.’ The proposition advanced by counsel is that the domicile which a woman acquires by marrying a man is a sort of mantle which she wears during her coverture and during her coverture only, and that when she

⁶ [1950] 1 All E.R. 199.

⁷ (1847) 5 Notes of Cases 440.

“ becomes a widow she reverts automatically to her domicile of
 “ origin. That proposition was not advanced in *Gout v. Zimmer-*
 “ *man*⁷ or in another case to which I was referred, namely, *In*
 “ *the Goods of Raffeneil*,⁸ where it was assumed that the rule
 “ which I have mentioned applied without any argument to the
 “ contrary being put forward. The proposition that the domicile
 “ which a married woman takes from her husband can be dropped
 “ in that way is based by counsel for the plaintiff on the use of
 “ the word ‘dependent,’ which is used in this connexion, because
 “ her domicile is said to be dependent on that of her husband,
 “ and counsel argues that when a woman’s husband dies there
 “ is no reason why she should not shed her domicile with her
 “ coverture and no binding authority that she does not do so.

“ Counsel for the Treasury Solicitor, on the other hand,
 “ pointed out that the proposition has been universally accepted
 “ as one of the principles of English law for a long time and it
 “ would lead to manifest inconvenience if the contrary were to
 “ be established as the law because this form of dependent
 “ domicile applies equally to infants. Counsel instanced a case
 “ of commorientes where, for example, a woman, although,
 “ apparently, dying at the same moment as her older husband, is
 “ deemed by the Law of Property Act, 1925, section 184, to have
 “ survived him. She, having had no opportunity of changing her
 “ domicile after his death, would be deemed, if the proposition of
 “ counsel for the plaintiff were correct, to revert automatically
 “ to her domicile of origin which might entail a most troublesome
 “ inquiry.

“ The speeches delivered in the House of Lords in *Udny v.*
 “ *Udny*⁹ all point against the validity of the proposition of
 “ counsel for the plaintiff—in particular, that of Lord Westbury
 “ where he used this language¹⁰: ‘Other domiciles, including
 “ ‘domicile by operation of law, as on marriage, are domiciles of
 “ ‘choice.’ He, therefore, included the domicile which counsel
 “ for the plaintiff prefers to call a dependent domicile under the
 “ heading of domicile of choice and that seems to me to be the
 “ appropriate heading under which to put it because when a
 “ woman marries a man she exercises a choice in the marriage
 “ and takes the consequences of that choice which in law involves
 “ the acquisition of his domicile. There is no reason why, if it
 “ is a domicile of choice, it should be lost in a way different from

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⁷ 5 Notes of Cases 440.

⁸ (1863) 3 Sw. & Tr. 49.

⁹ (1869) L.R. 1 Sc. & D. 441.

¹⁰ *Ibid.* 457.

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“ that in which any other domicile of choice can be lost, namely,
“ by abandonment.

“ Having arrived at this conclusion, I need not consider in
“ detail the question of the domicile of origin of Mrs. Lucie
“ Wallach herself. The domicile I have to consider is the domicile
“ of Mr. Eugene Wallach, her husband, to whom she was married
“ in 1906 in Frankfurt, Germany. His domicile of origin was
“ German, he having been born in 1874 in Kassel. [His Lord-
“ ship reviewed the evidence and concluded:]—I find that he
“ acquired a domicile of choice in this country which existed at
“ the time of his death. The issue, therefore, falls to be deter-
“ mined in favour of the Treasury Solicitor as to the English
“ domicile and it is unnecessary to make any further finding.”

It seems to me that those two cases reached quite different results, and it appears fairly clear that *In re Cooke's Trusts* ¹¹ was not cited to Hodson J., but are the two cases to be reconciled? I think that they are. In *In re Wallach*, ¹² before Hodson J., it is plain that the husband and wife had not parted; they were living evidently together until the husband's death and, therefore, there was obviously during the lifetime of the wife no conscious effort or intention on her part of any kind to change her domicile, whether it is called domicile as a dependant or domicile of choice; she was living with her husband, committed to live with him, and used his domicile, as far as she exercised her mind at all. On the other hand, in *In re Cooke's Trusts* ¹³ before Stirling J., the wife had been parted for many years from her husband, believed him to be dead, so during the lifetime of her husband had an overt intention to change her domicile to that of one in New South Wales, and, therefore, had shown an intention which was entirely absent in the case before Hodson J.

The whole matter, to some extent, is rather unreal, because, generally speaking, the question of domicile in its legal effects is not present to the mind of women in that position. All that they are thinking about is where they are going to spend the rest of their days, and where their permanent home is going to be.

In the present case the evidence is really stronger in some respects—though it is supported by a rather unsatisfactory affidavit—in this way: there are perfectly good reasons of a legal nature why the wife may have been advised in the present case to change her domicile deliberately from England to Guernsey because of the effect it might have with regard to

¹¹ 56 L.T. 737.

¹³ 56 L.T. 737.

¹² 66 T.L.R. (Pt. 1) 132.

death duty on her death. In those circumstances I cannot see why an intention which, as I found on the evidence, the wife was plainly shown to have in her mind during her lifetime—namely, to make her permanent home in Guernsey—but which cannot be effective in law until her husband was dead, should not be effective in law in accordance with her intention when she survives him. I have come to the conclusion in the present case that the intention which the testatrix had in fact formed during her lifetime was only prevented by a rule of law relating to the domicile of a wife from being effective in law; and I do not see why it should not be assumed that her intention continued after the death of her husband, and why one should come to the conclusion that some new overt act was required when all previous evidence is consistent with there having been no different intention during her life. Accordingly, in the present case I have come to the conclusion that the testatrix had an intention to acquire a domicile of choice in Guernsey and that that intention was effective in law.

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Danckwerts J.

Declaration accordingly.

I. G. R. M.

Solicitors: *Moon, Gilks & Moon.*

In re ATKINSON'S WILL TRUST.
PRESCOTT v. CHILD.

1956
Nov. 1, 2.

Upjohn J.

[1956 A. 1386.]

Trust and Trustee—Hancock v. Watson, rule in—Accruer clause—Effect—Gifts to two great-nieces—Trusts engrafted thereon—Effect of accruer clause on death of either without issue.

A testator directed that his residuary estate should be held on trust for his two great-nieces C. and E. in equal shares and provided that the share expressed to be given to C. should not vest absolutely in her but should be retained by the trustees on trust to pay the income to C. for life and in trust for her children or remoter issue as she should appoint, and in default of appointment on trust for her children who should attain 21 in equal shares. Then the testator, by reference to those trusts, declared similar trusts in respect of the gift of the other moiety to E.

The testator further directed as follows: "Provided always "and I declare that in the event of the failure or determination of

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"the trusts hereinbefore declared and contained concerning either
"of the shares in the said residuary moneys such share and the
"income thereof . . . shall go and accrue by way of addition to
"the other share in the said residuary moneys and such accruing
"share shall be held upon the trusts and subject to the powers and
"provisions herein declared and contained concerning the original
"share to which the same shall be added or as near thereto as
"circumstances will admit."

Both C. and E. survived the testator and died without issue, E. in 1927 and C. in 1955. On a summons to ascertain whether on C.'s death E.'s share passed to her or C.'s personal representatives, it was agreed that, since the original gift to C. and E. was absolute in terms, and the trusts were engrafted upon those absolute gifts, the rule in *Hancock v. Watson* [1902] A.C. 14 applied:—

Held, that as the gift was originally absolute with trusts later engrafted on it, the trusts, powers and provisions set out in the accruer clause had application only to the trusts engrafted on the gift and not to the gift itself, so that the share of E. vested in her personal representative.

Dictum of Evershed M.R. in *In re Burton's Settlement Trusts* [1955] Ch. 348, 358; [1955] 1 All E.R. 433 considered.

ADJOURNED SUMMONS.

By his will dated January 13, 1898, the testator, Edward Denis Atkinson, devised and bequeathed his residuary estate to his trustees on the usual administration trusts, and directed that they should "stand possessed of the residue of the said moneys
"in trust for my great nieces Constance Pim and Emily Pim
"(daughters of the said Henry Pim and Fanny his wife) in equal
"shares Provided always and I declare that the share in the said
"residuary moneys hereinbefore expressed to be given to the
"said Constance Pim shall not vest absolutely in her but shall
"be retained by my trustees upon trust that my trustees shall
"at their discretion invest such share in the names or under the
"legal control of my trustees [in manner therein provided] and
"shall pay the income of the said share and of the investments
"for the time being representing the same to the said Constance
"Pim during her life and after the decease of the said Constance
"Pim shall stand possessed of the said share and investments
"in trust for all or such one or more exclusively of the others or
"other of the children or remoter issue of the said Constance
"Pim such remoter issue to be born and take vested interests
"within twenty-one years after her death at such age or time
"or respective ages or times if more than one in such shares
"and with such future or other trusts for their benefit and such
"provisions for their respective advancement as the said
"Constance Pim shall from time to time by any deed or deeds

“revocable or irrevocable or by will or codicil appoint and in
 “default of and subject to any such appointment in trust for
 “all or any the children or child of the said Constance Pim who
 “being a son or sons attain the age of twenty-one years or being
 “a daughter or daughters attain that age or marry if more than
 “one in equal shares [then followed a hotchpot clause] and I
 “declare that the share in the said residuary moneys herein-
 “before expressed to be given to the said Emily Pim shall not
 “vest absolutely in her but shall be retained by my trustees
 “who shall hold the same share and the investments and income
 “thereof upon the like trusts and subject to the like powers and
 “provisions in favour of the said Emily Pim and her children
 “and more remote issue and otherwise as are hereinbefore
 “declared and contained concerning the share hereinbefore given
 “to the said Constance Pim and the investments and income
 “thereof in favour of the said Constance Pim and her children
 “and more remote issue in the same manner in all respects as
 “if such trusts powers and provisions were herein repeated with
 “the substitution of the name of the said Emily Pim for the
 “name of the said Constance Pim provided always and I declare
 “that if either of my said great nieces shall die in my lifetime
 “leaving issue living at my death the share hereinbefore
 “expressed to be given to her shall be held upon and for the same
 “trusts and purposes as if she had died immediately after my
 “death Provided always and I declare that in the event of the
 “failure or determination of the trusts hereinbefore declared and
 “contained concerning either of the shares in the said residuary
 “moneys such share and the income thereof or so much thereof
 “as shall not have been applied or disposed of under the trusts
 “or powers herein contained or by law vested in my trustees
 “shall go and accrue by way of addition to the other share in
 “the said residuary moneys and such accruing share shall be
 “held upon the trusts and subject to the powers and provisions
 “herein declared and contained concerning the original share to
 “which the same shall be added or as near thereto as circum-
 “stances will admit.”

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The testator died on January 31, 1904, leaving him surviving his two great-nieces, Constance Pim and Emily Pim. Emily Pim, whose full name was Emily May Pim, was born in 1877 and was married only once to one John Stephen Alexander. She died on April 26, 1927, without ever having had any issue. Constance Pim, whose full name was Constance Mary Pim, was born in 1874 and was married once only to Nicholas Gilbert

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Child. She died on June 26, 1955, without ever having had any issue. By her last will dated May 5, 1954, she gave the residue of her property unto and equally between the defendant residuary legatees.

Doubts having arisen as to what trusts now affect the testator's residuary trust estate, a summons was taken out by one of the trustees for the determination of the question whether, on the true construction of the testator's will and in the events which had happened, the residuary trust estate of the testator was, since the death of Constance Mary Child, held by the trustees of his will in trust (a) as to one moiety thereof for the personal representatives of Constance Mary Child as part of her estate and, as to the other moiety thereof, for the personal representative of Emily May Alexander as part of her estate, or (b) as to the whole thereof for the personal representatives of Constance Mary Child as part of her estate.

T. L. Dewhurst for the plaintiff.

Oliver Lodge for residuary legatees under the will of Constance Mary Child. The original gifts to Emily and Constance were both absolute in terms with trusts engrafted on them. The trusts engrafted on Emily's share included the accruer provisions, so that, on her death, her share became subject to the trusts of Constance's share for all purposes. In the events which happened the trusts concerning Constance's share failed on her death. Accordingly, the rule in *Hancock v. Watson*¹ applied so as to vest both shares in Constance's estate. This is a logical and sensible result since, if the trusts concerning Constance's share had not failed, it is admitted that Emily's share would have remained subject to those trusts and that both shares would have devolved together. The observations, obiter, of Sir Raymond Evershed M.R. in *In re Burton's Settlement Trusts*² are distinguishable. [Reference was also made to *Attorney-General v. Lloyds Bank*,³ *In re Litt*⁴ and *In re Grafton*.⁵]

M. O'C. Stranders for the legal personal representative of Emily May Alexander. The question is whether there is in the accruer clause an absolute gift which brings into play the principle of *Lassence v. Tierney*⁶ and *Hancock v. Watson*,⁷ so that the

¹ [1902] A.C. 14.

² [1955] Ch. 348, 358; [1955] 1 All E.R. 433.

³ [1935] A.C. 382, 395.

⁴ [1946] Ch. 154; 62 T.L.R. 303;

[1946] 1 All E.R. 314.

⁵ Unreported.

⁶ (1849) 1 Mac. & G. 551.

⁷ [1902] A.C. 14.

surviving daughter, Constance, takes absolutely. There was clearly an original absolute gift to each daughter, so that her original share remains to her on failure of the engrafted trusts. But in order that Constance, the survivor, can take Emily's share, in the events which have happened, a further absolute gift has to be found in the language of the accruer provision. This is clearly not so when (as here) the accruer is not to the person but to the share and in the ordinary common form. All that *In re Litt*⁸ decides is that where in the accruer provision there is a further absolute gift (as there was in that case) that absolute gift takes effect and the share accrues to the survivor.

The mere common form accruer clause (such as was used here) does not create such a further absolute gift. There are three indications of judicial authority to that effect, although it is not suggested that there is a binding decision on the point: see *Attorney-General v. Lloyds Bank*,⁹ *In re Litt*¹⁰ and *In re Burton's Settlement Trusts*.¹¹ The events which have actually happened were clearly not contemplated by the testator, as appears from the language of the gift over. All the ultimate trusts have failed in the case of both shares, whereas the language of the accruer clause was "in the event of the failure or determination of the trusts hereinbefore declared . . . concerning "either of the shares . . ." This distinguishes *In re Grafton*,¹² where the language was different. The result is that on this language there is only a partial accruer for the life of the surviving sister and then the original gift to Emily takes effect. It is wrong to talk of Emily's share reverting to her absolutely; in the events which have happened it never left her: see *Attorney-General v. Lloyds Bank*,¹³ *per* Lord Tomlin. The accruer clause was itself part of the "engrafted trusts" which failed and, since it contained no further absolute gift on the failure of those trusts, Emily's original absolute interest prevails on the principle of *Lassence v. Tierney*.¹⁴

If the argument for Constance were correct, the elaborate reasoning and judgments in *In re Litt*¹⁵ were wholly unnecessary, since every common form accruer clause to another share would be sufficient to bring *Lassence v. Tierney*¹⁶ into play in favour of the person to whose share the accruer took place. It would

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⁸ [1946] Ch. 154.⁹ [1935] A.C. 382, 394.¹⁰ [1946] Ch. 154.¹¹ [1955] Ch. 348, 358.¹² Unreported.¹³ [1935] A.C. 382, 394, 395.¹⁴ 1 Mac. & G. 551.¹⁵ [1946] Ch. 154.¹⁶ 1 Mac. & G. 551.

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have been also pointless in that case to make the distinction there made that not only was there in terms a further absolute gift but that the accruer was to the person and not the share.

UPJOHN J. This summons raises an interesting question of construction of a common form accruer clause which is to be found in the will of the testator, Edward Denis Atkinson, who died as long ago as January 31, 1904, and whose will, dated January 13, 1898, was proved in the Principal Probate Registry on March 22, 1904. He dealt with his residue in this way. After the usual administration trusts, he directed that his trustees "shall stand possessed of the residue of the said moneys in trust for my great nieces Constance Pim and Emily Pim (daughters of the said Henry Pim and Fanny his wife) in equal shares." Then, in a new sentence, he said: "Provided always and I declare that the share in the said residuary moneys hereinbefore expressed to be given to the said Constance Pim shall not vest absolutely in her but shall be retained by my trustees upon trust," which I can summarize in this way. It was on trust to pay the income to Constance for life, and in trust for her children or remoter issue as she should appoint, and in default of appointment upon trust for her children who should attain 21 in equal shares. Then the testator by reference to those trusts declared in similar terms in respect of the gift of the other moiety to Emily Pim. Then he continued—and this is the clause which gives rise to the difficulty: "Provided always and I declare that in the event of the failure or determination of the trusts hereinbefore declared and contained concerning either of the shares in the said residuary moneys such share and the income thereof or so much thereof as shall not have been applied or disposed of under the trusts or powers herein contained or by law vested in my trustees shall go and accrue by way of addition to the other share in the said residuary moneys and such accruing share shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning the original share to which the same shall be added or as near thereto as circumstances will admit."

Both the great-nieces survived the testator. Emily died in 1927, and Constance nearly 30 years later in 1955. Neither of them ever had any issue. The question is as to the disposition of the trust fund on the death of Constance.

There are three matters which are not in controversy. The first is that the original gift to Constance and Emily respectively

was absolute in terms, and that the trusts were engrafted on those absolute gifts, and it is, therefore, a typical *Lassence v. Tierney*¹ case. The second matter is that on the death of Emily the accruer clause operated on Emily's share and that Constance became entitled to the income thereof during her life. Had she had any children, of course, the original and the accruing share would have gone to such issue. Thirdly, on the death of Constance the original gift to her of her moiety remained, and under the doctrine I have mentioned her estate takes that share absolutely.

The whole issue in this case is: what is the true destination of the share of which Emily enjoyed the income during her life and subsequently Constance during her life? Mr. Lodge, for the representatives of Constance, submits that the accruer clause is apt and appropriate to carry Emily's share to Constance; because, putting it briefly, the accruer clause operates so as to add Emily's share to Constance's original share for all purposes, so that Emily's share must reach the same destination as Constance's share, whatever that destination may be.

On the other hand, Mr. Stranders, for the representatives of Emily, submits that the accruer clause only operates on the trust engrafted on to the original share, and not on the original gift to Constance.

Curiously enough, there appears to be no direct reported authority in which the matter has been argued and decided, but the problem has been discussed in two cases to which I must refer briefly.

The first is *Attorney-General v. Lloyds Bank*,² which was referred to by the Master of the Rolls in another case, which I must mention in a moment. In *Attorney-General v. Lloyds Bank*² the matter was not argued, but on a very similar clause Lord Tomlin, in the course of his speech in the House of Lords, analysed the trusts in the accruer clause and said: "Further, I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children." I think that it is reasonably clear, looking at the whole of Lord Tomlin's speech, that what he was saying was that an accruer clause such as this does not operate where there is a total failure of all the stocks, and in that case the original gift remains.

Sir Raymond Evershed M.R., in the recent case of *In re Burton's Settlement Trusts*,³ discussed this problem but did not

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¹ (1849) 1 Mac. & G. 551.² [1935] A.C. 382, 395.³ [1955] Ch. 348, 358; [1955] 1 All E.R. 433.

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express a concluded opinion on it for the reason that the daughter in that case, who died first, left everything by her will to her surviving sister, and, therefore, the matter was academic. However, I think that it is fair to say that the Master of the Rolls did express a tentative conclusion in reliance on the words I have quoted from Lord Tomlin's speech which was to the same effect, namely, that an accruer clause such as this has no operation where there is a total failure of all the stocks. He concluded his observations on this part of the case in these terms: "I have 'found that passage'—that is, Lord Tomlin's passage—"of 'some help towards my own inclination (and I express no final 'view) that a similar result, if it were necessary to decide it, 'should arise out of clause 4 [the accruer clause]."

I have been informed that Vaisey J., in *In re Grafton*,⁴ came to a different conclusion on a will which has been read to me in a case which was decided early this year but which has not been reported. Though I am indebted to counsel for a short note of Vaisey J.'s judgment, it does not really assist me on this point.

There is one other case to which I should refer, and that is *In re Litt*.⁵ That case establishes the proposition that it is quite possible, to put it shortly, to have a *Lassence v. Tierney*⁶ type of gift in an accruer clause. I think this much is clear—that in the case before me *In re Litt*⁷ has no direct application. It is, of course, of the essence of *Lassence v. Tierney*⁸ that there must be an absolute gift to a person in the first place. That was emphasized by Lord Greene in his judgment in *In re Litt*.⁹

In this case in the accruer clause there is no such absolute gift to a named person. The only gift is to the other share. Therefore, it seems to me that *In re Litt*⁹ can have no direct application to this case.

But Mr. Stranders has forcibly argued that, if the construction urged on me by Mr. Lodge is correct, that would have proved a very short answer in the case of *In re Litt*,⁹ and the elaborate judgments going into the question of whether the principle of *Lassence v. Tierney*¹⁰ can apply to an accruer clause would have been quite unnecessary.

However, although assisted by these authorities, it is clear that they do not bind me, and I propose to approach this problem free from authority.

⁴ Unreported.⁵ [1946] Ch. 154; 62 T.L.R. 303;

[1946] 1 All E.R. 314.

⁶ 1 Mac. & G. 551.⁷ [1946] Ch. 154.⁸ 1 Mac. & G. 551.⁹ [1946] Ch. 154, 158.¹⁰ 1 Mac. & G. 551.

There is clearly an original absolute gift to Emily and certain trusts are engrafted on it. In so far as those trusts fail, the original gift remains. Now, after her life interest, the only relevant trust was that the share was to go and accrue by way of addition "to the other share in the said residuary moneys."

Pausing there, it seems to me that the testator is starting to say that this share is to go over to another share. Had he made it plain that it was to go over to the other share for all purposes, there really could have been no doubt upon the matter. Constance must have succeeded in her claim to it. But he has not done so. He then goes on to define in very precise language exactly what is to happen to the share, and he does it in these terms: "and such accruing share shall be held upon the trusts "and subject to the powers and provisions herein declared and "contained concerning the original share to which the same "shall be added or as near thereto as circumstances will admit." So that this accruing share is to be held on certain trusts. What are those trusts? It seems to me, as a matter of construction, that the trusts, powers and provisions referred to there are trusts, powers and provisions engrafted on the original gift to Constance. I do not think, as a matter of construction, that they include the original gift to her, which was in absolute terms, but only the trusts engrafted on that original gift. If that be the right conclusion, then those trusts came to an end on the death of Constance by reason of the failure of issue, and, therefore, the original gift of Emily's share to her must remain, and I must declare accordingly.

Declaration accordingly.

Solicitors: *Foyer, White & Prescott; Janson, Cobb, Pearson & Co.*

J. L. D.

ROBSHAW BROTHERS LTD. v. MAYER.

[1956 R. 1564.]

*Practice and Procedure—Summary procedure under Order 14A—
Specific performance—Contract for consideration other than cash
—Meaning of "sale or purchase" in R.S.C., Ord. 14A.
"Sale." "Purchase."*

By a contract (as embodied in the 16th edition of the National Conditions of Sale) dated March 26, 1956, the "vendors" purported

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to contract to "sell" certain leasehold property to a purchaser. In a memorandum indorsed on the National Conditions of Sale the price was expressed to be "nil," the reason being that the property was held at a substantial rent, and the consideration for the transfer was the assumption that the tenant would undertake the obligations contained in the lease; and, consequently, no money passed.

The "vendors," having commenced an action for specific performance, a summons for judgment was issued under R.S.C., Ord. 14A, and an application was made to the court in a procedure summons to determine whether such procedure was appropriate in the case of such a contract:—

Held, that there was no context which would entitle the court to extend the prima facie meaning of the phrase "sale or purchase" in the Order; and that the words must be given their strict primary meaning, namely, an exchange of property for money; so that proceedings under Ord. 14A were not applicable.

J. & P. Coats v. Inland Revenue Commissioners [1897] 1 Q.B. 778; [1897] 2 Q.B. 423; 13 T.L.R. 548; *Simpson v. Connolly* [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474; *In re Sutton's Contract* [1921] W.N. 9; 65 S.J. 259 considered.

PROCEDURE SUMMONS.

By a contract of sale (as embodied in the 16th edition of the National Conditions of Sale) dated March 26, 1956, the vendors, Robshaw Brothers Ltd., contracted to sell certain leasehold property at Bournemouth, held under a lease, dated November 17, 1950, to George Mayer, the purchaser. In a memorandum indorsed on the National Conditions of Sale the price was expressed to be "nil," the reason being that the leasehold property was held at a substantial rent, and the consideration for the transfer was the assumption that the tenant would undertake the obligations contained in the lease. No money, therefore, passed.

In the events which happened, a writ was, on September 4, 1956, issued by the vendors for specific performance, and on October 9, 1956, a summons for judgment was issued under R.S.C., Ord. 14A.¹

¹ R.S.C., Ord. 14A: "1. (1) In any action in the Chancery Division commenced by a writ of summons indorsed with a claim for specific performance of an agreement, whether in writing or not, for the sale or purchase of property, with or without alternative claims for damages, for rescission or for the forfeiture or return of the deposit, the plaintiff may (whether the defendant has appeared or not), on affidavit made by himself, or by any other person who can swear positively to

"the facts, verifying the cause of action and stating that in his belief there is no defence to the action, apply to the court or a judge for judgment and the court or judge may thereupon give judgment in the action, unless the defendant by affidavit or by his own viva voce evidence or otherwise, satisfies the court or judge that he has a good defence to the action on the merits, or discloses facts sufficient, in the opinion of the court or judge, to entitle him to defend . . ."

An application was made to the court in a procedure summons to determine whether Ord. 14A applied to the present contract, the question being whether the words "sale or purchase" in the Order meant "sale or purchase for money" or could be given a broader meaning, namely, "sale or purchase either for money's "worth or for valuable consideration."

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Martin Roth for the plaintiffs. Whether Ord. 14A applies to this case depends on the meaning of the phrase "sale or "purchase" in the Order. That Order is applicable here, for the meaning of "sale" there is wider than the primary meaning of a transfer for money: see the definition in the Shorter Oxford English Dictionary: "The exchange of a commodity for money "or other valuable consideration"; and the dictionary gives "purchase" a series of meanings: "(4) Law. The acquirement "of property by one's personal action, as dist. from inheritance. "(5) Acquisition by payment of money or an equivalent." Wharton's Law Lexicon is not very helpful as regards a definition of "sale;" but it states that "purchase" is, "in its popular "sense, an acquisition of land, obtained by way of bargain and "sale, for money or some other valuable consideration." [Reference was also made to Wolstenholme & Cherry's Conveyancing Statutes, vol. 1, p. 588, where the definition of "purchaser" in section 205 (xxi) of the Law of Property Act, 1925, is considered.]

In Benjamin on Sale, 8th ed., p. 2, it is made clear that, under the Sale of Goods Act, 1893, s. 1 (1), the definition of a contract of sale of goods as a contract whereby the seller transfers the property in goods to a buyer for a money consideration called the price, applies only to goods. Again, in Williams on the Contract of Sale of Land, p. 3, "sale" is defined in its strict and primary sense of meaning as "an agreement for the conveyance "of property for a price in money; but the word 'sale' may be "used in law in a wider sense and so applied to the conveyance "of land for a price consisting wholly or partly of money's worth "other than the conveyance of some other land."

It is clear from a consideration of sections 1 and 2 of the Vendor and Purchaser Act, 1874, that the phrase "contract for "the sale of land" is sufficiently wide to cover a case of the present kind. It would be absurd if this contract could only be brought within the scope of Ord. 14A by the insertion of a nominal consideration. The plaintiffs' contention that a wider meaning must be given to the words "sale or purchase" than that of a

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mere transfer of property for money is supported by the observations of Willes J. in *Stranks v. St. John*² and of Finnemore J. in *Simpson v. Conolly*.³

Maurice Price for the defendant. This procedure summons cannot have the result for which the plaintiffs contend. The expression "sale or purchase" in Ord. 14A can only be given its strict primary meaning of a sale or purchase for money. [*In re Sutton's Contract*⁴ was referred to.] This is a question of construction. The observations of Willes J. in *Stranks v. St. John*⁵ are obiter, and the court is not bound by *J. & P. Coats v. Inland Revenue Commissioners*.⁶

UPJOHN J. By a contract, expressed to be a "contract of sale" (in fact as embodied in the 16th edition of the National Conditions of Sale), dated March 26, 1956, the plaintiffs contracted to "sell" certain leasehold property held under a lease dated November 17, 1950, to the defendant. In a memorandum indorsed in the usual way on the National Conditions of Sale the price was expressed to be "nil." The reason for that was this: the leasehold property was held at a substantial rent and the consideration for the transfer (to use a neutral term) was the assumption by the tenant of the obligations contained in the lease of November 17, 1950; and so no money passed.

The whole question, which I have to determine, is whether such a contract is one for which proceedings under Ord. 14A are appropriate in an action for specific performance of the contract.

Neither side relies on any particular clear condition in the contract as affecting the matter, and, therefore, I do not refer further to the contract.

Order 14A, so far as relevant, is in these terms: [His Lordship read the material part of Ord. 14A and continued:] The writ in this action for specific performance was issued on September 4, 1956, and the summons under Ord. 14A was issued on October 9. The point for determination taken by the defendant is that the contract is not a contract for the "sale or purchase" of property. It is submitted on behalf of the defendant that "sale," as an ordinary legal effective term, denotes a sale for money, and, as no money passed on the occasion of this contract, it cannot properly be described as a contract for sale or a contract for purchase.

² (1867) L.R. 2 C.P. 376, 379.

³ [1953] 1 W.L.R. 911, 915.

⁴ [1921] W.N. 9; 65 S.J. 259.

⁵ L.R. 2 C.P. 376.

⁶ [1897] 1 Q.B. 778.

On the other side it is submitted for the plaintiffs that the words "sale or purchase" have no fixed meaning, but must be given a meaning appropriate to the context, and that in the circumstances "sale or purchase" ought to have a wider meaning such as that given by some law text writers, in particular in Wharton's Law Lexicon, 14th ed., at p. 823, where it says that purchase is "an acquisition of land, obtained by way of bargain "or sale, for money or some other valuable consideration."

In my judgment, the law is correctly stated in an interesting article by Mr. Cyprian Williams on this particular question in The Solicitors' Journal, vol. 65, at p. 286, but before reading that I will refer briefly to *In re Sutton's Contract*,¹ which came before Lawrence J. and is reported in the same volume of The Solicitors' Journal. One question which arose there was whether the sale of certain settled land for consideration other than cash was a proper exercise of Settled Land Act powers. The judge held that it was, and it is interesting to note that he so held for the reason—I am quoting from his very short judgment as reported—that "Consols are as good as cash." In the article to which I have referred that judgment was criticized, and that criticism by Mr. Cyprian Williams, in my judgment, correctly states the law: "But it is well established by judicial authority "that in English law the primary meaning of the word 'sale' is "the conveyance of some article for money." He refers to *J. & P. Coats v. Inland Revenue Commissioners*,² and then says "that "a power to sell means, in the absence of any context, a power to "sell for money and that a person who exercises such a power is "bound to sell for money": see *per* Stirling J. in *Payne v. The Cork Co. Ltd.*³ That follows the definitions which are to be found in Benjamin on Sale, 8th ed., p. 1, and in Williams on Vendor and Purchaser, 4th ed., p. 1. I propose to refer briefly to *J. & P. Coats v. Inland Revenue Commissioners*⁴ for a reason which will appear in a moment. That was a case under the Stamp Act, 1891, and it contains a classic passage by Wills J.⁵: "Now, " 'sale' undoubtedly in our law generally imports the exchange of "some commodity or some article of property for money, and it "will be found so defined in Mr. Benjamin's book on Sale, and I "think in Lord Blackburn's book also." The judge then proceeded to consider section 55 of the same Act, which he pointed out

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¹ [1921] W.N. 9; 65 S.J. 259.³ [1900] 1 Ch. 308, 314; 16 T.L.R.² [1897] 1 Q.B. 778; affirmed 185.

[1897] 2 Q.B. 423; 13 T.L.R. 548.

⁴ [1897] 1 Q.B. 778.⁵ *Ibid.* 783.

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appeared to enlarge the ordinary meaning of the word "sale." He continued: "That is a clear indication that there may be, within the meaning of these sections, a conveyance on sale where the transaction is not properly a sale in the ordinary understanding of the word, because it is not for money." I read that passage because I think that it gives the clue to the definition to be found in section 205 of the Law of Property Act, 1925, where "sale" is defined in these terms: "'Sale' includes an extinguishment of manorial incidents, but in other respects means a sale properly so called": that seems to me to mean a sale for money.

A modern judicial expression of the *prima facie* meaning of "sale" is to be found in *Simpson v. Connolly*.⁶ The headnote is very short: "An agreement to extinguish an existing debt if land is transferred is not a sale of land." Finmore J. said: "But the general principle of English law in regard to sale is that a sale means the exchanging of property for money. That applies—I think both counsel agree—to a sale of land and to a sale of chattels equally." Such is the primary meaning of the word "sale."

There are, no doubt, to be found authorities and statutes which have extended that meaning. In *Williams on The Contract of Sale of Land*, it is stated on p. 3: "'Sale,' in the strict and primary sense of the word, means an agreement for the conveyance of property for a price in money; but the word 'sale' may be used in law in a wider sense and so applied to the conveyance of land for a price consisting wholly or partly of money's worth other than the conveyance of some other land." Apparently, he considered that a sale for something other than money can in a wider sense be properly described as a sale. The authority to which he refers in support of the last part of that paragraph is *Stranks v. St. John*.⁸ The question in that case was purely one of title, as appears from the very brief headnote, which is in these terms: "By agreeing to let, a lessor impliedly promises that he has a good title to let." The observations of Willes J. must be read, of course, in relation to the question of title as stated in the headnote. What Willes J. said was this:⁹ "If it is expressly agreed that the lessor shall grant a *good and valid* lease, as in *Robinson v. Harman*,¹⁰ there can be no doubt in the matter, and the only question in that case was with respect to the amount of damages; but, in

⁶ [1953] 1 W.L.R. 911; [1953] 2 All E.R. 474.

⁸ L.R. 2 C.P. 376.

⁹ Ibid. 379.

⁷ [1953] 1 W.L.R. 915.

¹⁰ (1848) 1 Ex. 850.

“any case, I think it must be implied that the lease shall be a valid one. This would be clear apart from authority, because a lease for seven years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title.”

Further, I do not think that it can seriously be doubted that the words “contract for sale of land” appearing in section 1 of the Vendor and Purchaser Act, 1874, must be given a wider meaning than a sale for the price of money, having regard to the context to be found in section 2 of that Act. Again, as appears from the judgment in *J. & P. Coats v. Inland Revenue Commissioners*,¹¹ the case under the Stamp Act, 1891, the prima facie meaning of “sale” in the sense of sale for money is extended in the Stamp Act, 1891.

I do not find authorities on the construction of statutes really of assistance in this case, because they all depend on the context to be found in the particular statute. The real question which I have to consider is whether I ought to give the words “sale or purchase” in Ord. 14A what has been called their primary meaning, that is a sale or purchase for money; or whether I can give them a broader meaning, meaning a sale or purchase either for money’s worth or for valuable consideration.

It has been pointed out, of course, that the words “sale or purchase” in the Order are plainly correlative, and it has been urged that, in view of the wide definition of “purchase” in section 205 (xxi) of the Law of Property Act, 1925, I ought to give a wide meaning to “purchase,” and, therefore, to “sale” in Ord. 14A. But I think that the word “purchase” in the Law of Property Act, 1925, had to be given a very wide ambit for the reason, among others, that it was concerned with the doctrine of purchase for value without notice. Of course, in this present case, there is no doubt that the defendant is a “purchaser for value” of a lease, but that again does not really help me in the construction of this Order.

I approach the problem certainly with a desire to give the order as wide an ambit as possible, for it is a procedural provision, and those who practise in the Chancery Division know that it is of the greatest possible utility in enabling plaintiffs, where they have reason to believe that there is no defence to the action, to get judgment in a summary way. If I thought that I could properly do so, I should certainly extend the ambit of the rule to cover this case.

¹¹ [1897] 1 Q.B. 778.

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But I come back to the question of construction. I am really being asked in this case to give to the phrase "sale or purchase" not its plain prima facie meaning of sale or purchase for money, but to cover a transaction for valuable consideration. The Order does not use that phrase. I can find no context which would entitle me to extend the prima facie meaning of "sale or purchase" in this Order. I cannot see how I can enlarge it, for instance, to include an exchange which plainly is not a sale or purchase. Nor, for instance, could I extend it to the case of a transfer in consideration of what is not normally described as a sale or purchase, e.g., marriage. I think that I must give to these words their strict primary meaning, and that is "sale" or "purchase in consideration of money." Accordingly, the preliminary point succeeds, and I must dismiss this application under Ord. 14A.

I trust that the matter will be brought to the attention of the Rules Committee so that the jurisdiction under Ord. 14A may be enlarged in appropriate circumstances.

Application dismissed.

Solicitors: *Montagu's and Cox & Cardale for Snell & Co., Tunbridge Wells; Roche, Son & Neale for Peter Horden, Bournemouth.*

J. L. D.

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Nov. 20, 21.

Danckwerts J.

In re STRATTON'S DISCLAIMER.
STRATTON AND OTHERS *v.* INLAND REVENUE
COMMISSIONERS.

[1956 S. No. 2134.]

Revenue—Estate duty—Property chargeable—Disclaimer of specific legacies—Disclaimer within five years of death of disclaimant—Resulting benefit to residuary legatees—Liability to estate duty on death of disclaimant—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 45.

The widow of a testator disclaimed all interest in specific legacies and a devise to which she was entitled under the will of her husband, and that property, in consequence, went to her three sons, the residuary legatees. She died within five years of making the disclaimer. The Crown claimed that estate duty was payable on her death by virtue of section 45 (2) of the Finance Act, 1940, in

that the disclaimer was "the extinguishment at the expense of
 "the deceased of a debt or other right . . . in favour of the person
 "for whose benefit the debt or right was extinguished . . ."
 within the meaning of those words in the subsection:—

Held, (1) that the right to the specific legacies and devise under the will was, pending the disclaimer, an inchoate right, which was a right within the ordinary meaning of that word, and must be held to have been extinguished by the disclaimer.

(2) That the disclaimer was "at the expense" of the widow within the meaning of the subsection, which was not limited to an expense in the nature of a disbursement.

(3) That she must, in the absence of evidence to the contrary, be presumed to have intended the result of the disclaimer, namely, to benefit her sons, in whose favour the right was extinguished; and accordingly the Crown's claim that estate duty was payable on her death was correct.

In re Parsons [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496 applied.

In re Wimperis [1914] 1 Ch. 502 distinguished.

ADJOURNED SUMMONS.

By his will dated July 16, 1946, Frederick William Stratton made specific bequests to his widow, Fanny Stratton, of 12 policies on his life of £800 each and one policy of £400 in a certain insurance company; and secondly, a specific devise of his freehold houses and premises in Tottenham which were used in connexion with his business and in which his sons were given certain rights and options but which, in the event that happened, went to his widow absolutely under an alternative gift. The testator gave his residuary estate in equal shares to his three sons, the plaintiffs in this summons.

The testator died on October 20, 1949, and his will was proved on November 2, 1950.

No assent was made by the executors in favour of the widow in respect of the property devised or bequeathed to her under the will; and by a deed of disclaimer dated May 28, 1951, she declared: "I the said Fanny Stratton do hereby irrevocably
 "disclaim and renounce all beneficial interest to which I am or
 "may be entitled under said will in the said policies of insurance
 "and each of them and the bonuses and additions thereto and
 "in the said freehold property." The disclaimer recited the gifts in the husband's will and that the widow was desirous of
 "disclaiming the said gifts and all my interest therein. . . ."
 The disclaimer contained no information as to the intention or motive of the widow in making the disclaimer.

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She died on June 27, 1953, which was within five years from the date of the disclaimer. She appointed her three sons executors and trustees of her will which was dated June 29, 1951, and proved by them on August 29, 1953.

The Inland Revenue Commissioners claimed that estate duty became payable on the death of Fanny Stratton in respect of the property disclaimed by her by virtue of section 45 (2) of the Finance Act, 1940.¹

The combined value of the policies and freehold property for estate duty purposes, if liability were established, had been agreed by the parties at £30,306, and the duty thereon at £4,079 0s. 5d.

The plaintiffs took out the present summons to have determined whether by virtue of section 45 (2) of the Finance Act, 1940, a liability for estate duty arose on the death of Fanny Stratton under section 2 (1) (c) of the Finance Act, 1894 (as amended by section 59 of the Finance (1909-1910) Act, 1910, and section 47 of the Finance Act, 1946) in respect of the property disclaimed by the deed of disclaimer, dated May 28, 1951, and executed by Fanny Stratton within five years of her death.

Henry Salt Q.C. and *A. J. Belsham* for the plaintiffs. It is contended that disclaimer cannot by implication, much less on the express wording, be brought by the Crown within the natural meaning of section 45 (2) of the Finance Act, 1940, any more than a money payment could (pending later statutory definition) be brought within "transfer of property" in section 46: *St. Aubyn v. Attorney-General*.² Otherwise the legislature would

¹ Finance Act, 1940, s. 45:
 "(1) The creation by a person or
 "with his consent of a debt or other
 "right enforceable against him personally or against property of
 "which he was or might become
 "competent to dispose, or to charge
 "or burden for his own benefit, shall
 "be deemed for the purposes of the
 "enactments relating to estate duty,
 "including this Part of this Act, to
 "have been a disposition made by
 "that person, and in relation to such
 "a disposition the expression 'property'
 "shall include the debt or right
 "created.

"(2) The extinguishment at the
 "expense of the deceased of a debt
 "or other right shall be deemed for
 "the purposes of the said enactments to have been a disposition
 "made by the deceased in favour of
 "the person for whose benefit the
 "debt or right was extinguished,
 "and in relation to such a disposition the expression 'property' in
 "the said enactments shall include
 "the benefit conferred by the
 "extinguishment of the debt or
 "right."

² [1952] A.C. 15; [1951] 2 All E.R. 473.

have been enacting an absurdity, viz., that if A, without consulting B, were to assure property voluntarily to B, and B were to disclaim the subject-matter (whether advantageous to him or not) A would be liable to pay on B's death within five years of the disclaimer a proportion of the aggregate estate duty. Yet the disclaimer had retrospective effect and A's assurance was abortive to pass anything from A to B. For this purpose there is no distinction between bounty proffered inter vivos and by will.

Where the donee of a life interest disclaims it before it becomes an interest in possession, no duty is leviable on his death under section 43. The same principle and practice are applicable under section 45 in regard to the irrevocable disclaimer of an absolute interest before possession taken.

It takes two to make a gift. An irrevocable disclaimer rebuts any presumption of acceptance and evidences a rejection ab initio. The property remains vested or becomes retrospectively re-vested in the assurator or in the testator's estate. The disclaimant drops out from the start and whoever else may take does so by way of substitutional disposition from the assurator or testator and not through or from the disclaimant. Section 45 is introduced by a rubric or heading "Gifts by way of creation of burden or release of right" and deals with a mode of giving. It contemplates a nexus between the deceased and "the person" in favour of whom and for whose benefit the debt or right was extinguished. There is no such nexus between a deceased disclaimant and the person taking in default—at any rate unless there is evidence of an intention on the part of the former to benefit the latter. In the present case the deed is a bare disclaimer and no intention is expressed. The law and the will are left to take their course.

The Crown's construction of section 45 is strained and unmeritorious. It cannot in this court be contended, in the face of the appellate decision in *Rex v. Special Commissioners of Income Tax*,³ that "other right" is necessarily ejusdem generis with "debt." But there must be some limit on "other right" if absurdity is to be avoided. The mischief aimed at by section 45 is devious modes of giving not otherwise caught by "the enactments relating to estate duty." For example, before the enactment of section 45 of the Finance Act, 1940, the gratuitous cancellation inter vivos by the deceased of a debt due to himself was not caught by section 2 (1) (c) of the Finance Act, 1894. Nor was a transaction necessarily so caught by which the deceased paid off the creditor of another person.

³ [1923] 1 K.B. 393; 39 T.L.R. 99.

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It cannot be suggested without absurdity that, if a shareholder declines or omits to take up a beneficial "rights offer" by a company, other shareholders who take it up amongst them under a secondary option are liable to duty on the shareholder's death. Moreover, duty is not attracted under section 45, at any rate in practice, when a surviving spouse dies within five years after unconditionally forgoing *jus relict*i or *legitim* in the deceased's estate in Scotland, or a statutory right to a lump sum under an intestacy in England.

The meaning of "debt or other right" is not at large, although it is nowhere defined in the Act of 1940. The "other right" must resemble a debt to this extent, that it must have been extinguished at the expense of the deceased by his putting his hand in his pocket for the purpose. "At the expense" does not include "to the detriment."

Neither of the component subsections of section 45 embraces the negative act of forgoing an estate or proprietary interest. In subsection (1) the debt or other right created are alike to be "enforceable against him [the deceased] personally or against property of which he was or might become competent to dispose . . . for his own benefit." That expression does not cover the creation of an estate or beneficial interest in property, for that would constitute an actual disposition and would not need to be "*deemed* to have been a disposition." Similarly, in subsection (2) of section 45, the disclaimer of an estate or beneficial interest in property (e.g., a legacy) is not embraced in the phrase "extinguishment of a debt or other right." If a bequest confers an interest in property, what is disclaimed is on that hypothesis not a mere "right" but the beneficial interest itself.

But if at the outset the legatee has an option to accept or reject, that is an inchoate matter which is retrospectively destroyed ab initio by disclaimer: Sheppard's Touchstone, 7th ed., pp. 285, 452, and cases there cited by the editor. The law has always distinguished sharply between renunciation, on the one hand, and acceptance followed by release of an accrued right or interest, on the other hand. *Thompson v. Leach*⁴ and later cases establish this; and irrevocable disclaimer by a legatee has even been assimilated to lapse by the legatee predeceasing the testator.

*In re Parsons*⁵ is distinguishable from the present case. That case turned on section 5 (2) of the Finance Act, 1894, as amended, and upon the meaning of "competency to dispose" and "general

⁴ (1690) 2 Vent. 198.

⁵ [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

"power" in section 22 (2) (a). Lord Greene M.R. observed ⁶ that the fact that for some purposes a disclaimer makes the gift void ab initio did not mean that in the interval between the testator's death and the disclaimer the competence must be treated in law as not having existed. *In re Parsons* ⁷ does not assist in the construction of section 45 of the Act of 1940. [Reference was made to Dymond's Death Duties, 12th ed., pp. 165 et seq., and Supplement (1956), p. 8.]

The only initial right of a specific legatee pending disclaimer or acceptance express or implied is to have the estate administered. It is not that right which section 45 (2) contemplates as having been extinguished.

Belsham following. Nobody would dispute that a specific legatee has some rights which he extinguishes by disclaiming. In subsection (2) there is no definition of the word "right," but it occurs in subsection (1), where it is defined with some particularity. The court must construe subsection (2) on the basis that "right" there is a like right to that in subsection (1). It must be enforceable against the person extinguishing it, or property which he was or might be competent to dispose or charge. That does not mean that the right extinguished was the right of the person who extinguished it. Many kinds of right would come within the subsection, for example, a release of a restrictive covenant or general power of appointment. Those rights would be extinguished by release, surrender or assignment, but disclaimer does not operate by way of release, surrender or assignment.

It was held in *In re Wimperis* ⁸ that a married woman could disclaim property notwithstanding that it was subject to restraint or anticipation because, if she disclaimed it, the restraint never attached to the property at all, as it had never become her property.

The words in subsection (2) are "the person for whose benefit the . . . right was extinguished . . .," but the right which is extinguished by the disclaimer is not the legacy at all; it is what Lord Greene M.R. described in *In re Parsons* ⁹ as the competency to take the legacy, and the words in subsection (2) are inapt to cover a disclaimer.

There was no assent to the legacy in this case, and there may be some difference before and after assent, although disclaimer is still possible after assent, but until assent or conveyance a beneficiary has only an inchoate right to a legacy: see Williams

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⁶ [1943] Ch. 12, 16.

⁷ [1943] Ch. 12.

⁸ [1914] 1 Ch. 502.

⁹ [1943] Ch. 12.

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on Executors, 13th ed., p. 768, para. 1187. That inchoate right before assent is the only right which has been disclaimed and is not measurable for estate duty.

John Pennycuik Q.C. and *E. Blanshard Stamp* for the Crown. The scheme of subsection (2), which is the material subsection, is this: first there is specified a type of disposition which must be at the expense of the deceased, that is the extinguishment of "a debt or other right," and that extinguishment is "deemed" to have been a disposition made by the deceased "in favour of" the person for whose benefit the debt or right was extinguished "...". That deemed transaction is sometimes called a notional transaction. The words "in favour of the person, etc." describe that notional transaction.

The Crown has to show the extinguishment of the "debt or other right," but it is not concerned to show that the transaction was intended for the benefit of anybody; it is not concerned with the motive of the disposition. It is sufficient if the Crown is able to establish that the right was extinguished at the expense of the deceased. The only possible view is that the person in whose favour the right was extinguished was the person who did take the benefit. If Parliament had intended to make a charge of estate duty only where the extinguishment had been intended to benefit somebody it would have said so.

Alternatively, everyone must be presumed to intend the consequences of his own acts, and if anyone executes a document which will have the effect of benefiting a person he must be presumed to have intended to benefit that person. The Crown does not need to establish an intention to benefit, because that intention must always be presumed, on the ground that there is a presumption that everyone intends the consequences of his acts. Thus the law presumes that every grant is for the benefit of the grantee: see *Sheppard's Touchstone*, 7th ed., vol. 2, p. 285. There is no reason, therefore, why the law should not presume that every disclaimer is intended to be for the benefit of the person taking as a result of the disclaimer. If a person possesses a right and extinguishes it, then that right must benefit somebody, otherwise that right would be worthless; and a person who extinguishes a valuable right must be presumed to have intended to benefit the person on whom the extinguishment will confer a right.

The presumption of intention can be displaced by affirmative evidence, for instance, where a testator made his money out of the liquor trade and gives it to a teetotaler who refuses it because

he considers that it is tainted money. In such a case evidence could be given to rebut the presumption of intention. Here the presumption that the deceased intended to benefit her sons has not been displaced.

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The transaction which has to be established consists of three elements: (1) there has to be a debt or other right; (2) it has to be extinguished, and (3) it has to be extinguished at the expense of the deceased. Those three elements are plainly present in the case of a disclaimer. As to the first point, it is said that the legatee does not have a right for the purposes of subsection (2). The Crown's submission is that it is clear that a legatee does possess such a right; there is nothing in the context of subsection (2) taken alone or read in conjunction with subsection (1) which could exclude a disclaimer.

[He was stopped on this point.]

The moment the testator dies the legatee has a right to have the legacy paid to him; that right is satisfied by the payment of the legacy or extinguishment by disclaimer: in the case of disclaimer the law adjusts the proprietary interests as if the legacy had never been given to the disclaimant, and brings about a retrospective adjustment as if the legacy had never existed. But until the disclaimer is executed the disclaimant has a right. Thus in *In re Wimperis*¹⁰ the legatee had no estate because it was destroyed retrospectively, and she was in the position of never having accepted it so that the restraint could not attach to the property. But that did not mean that until the disclaimer the legatee had no right.

With regard to the meaning of "expense," it was suggested that expense meant disbursement; that would, however, make nonsense of the subsection. What the deceased had was a right of action which if enforced would in due course mature into money in her pocket; by disclaimer she has destroyed that way of getting money into her pocket. If expense meant disbursement, it would be covered by section 2 (1) (c) of the Finance Act, 1894, and section 45 (2) would add nothing at all. The definition of expense in the Oxford English Dictionary includes "charge, cost, or sacrifice," which is generally summarized in legal parlance by the word "detriment."

Accordingly, the disclaiming legatee has a right which is extinguished by the disclaimer to the detriment of the disclaimant, and that extinguishment is for the purpose of subsection (2)

¹⁰ [1914] 1 Ch. 502.

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deemed to be a disposition by her in favour of the persons who in fact benefit, namely, the residuary legatees.

Salt Q.C. replied.

DANCKWERTS J., having stated the facts, continued: It is, of course, well known that section 38 of the Customs and Inland Revenue Act, 1881, included in the property which was deemed to pass on the death of a deceased the subject-matter of gifts (putting it shortly) made within three months before the death of the deceased. Various statutes, to which I need not refer, have increased the time within which, in case of death, duty will be payable to one year, three years and five years.

The particular point which I have to decide arises upon an extension of the meaning of "gifts," introduced by section 45 of the Finance Act, 1940, which also contained extensive provisions about dispositions and determinations of life interests in section 43. Section 45 has a heading or rubric: "Gifts by way of creation of burden or release of right." It is subsection (2) of that section with which I am concerned, but I will read subsection (1) because an argument has been founded on that subsection.

[His Lordship read section 45 (1) and (2) of the Finance Act, 1940.]

As I said, subsection (2) is the provision which I have to construe, and it is claimed that the disclaimer by Mrs. Stratton of the gifts in her husband's will falls within the provisions of subsection (2).

It seems to me that there are four things which have to be established in order that duty shall be payable under that subsection. First of all, there must be possessed or owned by the deceased in some way "a debt or other right." Secondly, there must be an extinguishment of that debt or other right. Thirdly, the extinguishment must be at the expense of the deceased. And lastly, it must have been extinguished for the benefit of some person.

Before I consider the nature of a right I must refer to an argument of Mr. Salt and Mr. Belsham on behalf of the plaintiffs, that, having regard to subsection (1), the meaning of the words "debt or other right" in subsection (2) must be restricted in some way or other. I found that argument extremely difficult to follow, and not to be really helpful, because the subject-matter of subsection (2) is not necessarily the same as the subject-matter of subsection (1). In certain respects it is

obviously different, and it would be quite wrong therefore to give a restricted meaning to the words "debt or other right" in subsection (2) merely because of the terms of subsection (1). I see no reason why the words "debt or other right" should be restricted in subsection (2) within any narrower field than the natural meaning of those words. In consequence it seems to me, subject to any special case that may arise, "other right" must mean any kind of right; at any rate, any kind of right having a value of some kind or other.

Prima facie one would suppose that the right to receive a legacy was obviously a right, and that, therefore, as the disclaimer extinguishes that right, the first two requirements of the subsection are satisfied.

An elaborate argument was put up for the purpose of showing that the effect of a disclaimer was to destroy the right to a legacy as if it had never existed. Mr. Salt referred me to Sheppard's Touchstone (7th ed. (Preston), vol. 2, pp. 285 and 452), and other elderly authorities for the purpose of establishing that proposition, and there is no doubt it is perfectly correct for many purposes that the effect of a disclaimer is to extinguish a legacy as though it had never been in existence at all, because for such purposes it relates back to the date of the testator's death. In *In re Wimperis*¹ Warrington J. applied that proposition to the disclaimer by a married woman of a legacy which was given to her subject to a restraint on anticipation, in such a way that he held that the disclaimer was operative and not restricted by the restraint; if the married woman had attempted to dispose of the legacy to someone else by release or conveyance, plainly the restriction caused by the restraint would have prevented the operation being effective.

Warrington J. said this²: "But in the present case if the "married woman has in fact declined the gift she never had an "estate for her separate use and has never been subject to the "restraint on anticipation. . . ." On the other hand, I find it very difficult to reconcile that, for at any rate all purposes, with the decision of the Court of Appeal in *In re Parsons*.³ The question in *In re Parsons*³ was whether a husband who disclaimed a legacy which he had been given by his wife was within section 5 (2) of the Finance Act, 1894, in the sense that he had been competent to dispose of the legacy in question.

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¹ [1914] 1 Ch. 502.² Ibid. 509.³ [1943] Ch. 12; 59 T.L.R. 19;
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If one applied the principle decided in *In re Wimperis*⁴ to the greatest degree, it would seem to me that the Court of Appeal would not have reached the conclusion which they did reach, that the husband had, in that case, been competent to dispose of the legacy in question. It seems to me that the argument would have been, as it was indeed in that case, that as the legacy never had any existence by reason of the disclaimer, there was nothing of which the husband was ever competent to dispose. That was rejected by the Court of Appeal, and they held that the husband was in fact competent to dispose of the legacy in question.

Lord Greene in the course of his judgment in *In re Parsons*⁵ said, after he had referred to section 22 (2) (a) of the Finance Act, 1894⁶: "That language seems to me clearly to cover the case of a legatee to whom a legacy has been given and who is in a position either to take it or to disclaim it as he thinks fit. In the present case the husband was in that position during the interval between the testatrix's death and the disclaimer, and I need scarcely add that the fact that for some purposes a disclaimer makes the gift void ab initio does not mean that during the period to which I have referred the competence must be treated in law as not having existed. The doctrine of the gift being void ab initio has nothing to do with considerations of that kind."

Consequently, it seems to me that the decision in *In re Wimperis*⁷ cannot be of wider application than the circumstances of that case require. In *Williams on Executors* (13th ed., at p. 768), which was cited to me, it is said that "Until assent or conveyance, a beneficiary has an inchoate right transmissible to his personal representatives . . ." It seems to me, therefore, that I must treat Mrs. Stratton as having had at least an inchoate right to the legacies in question and the subject of the devise pending the execution by her of a disclaimer. It seems to me that an inchoate right is a right within the meaning of the word "right" in its ordinary sense, and therefore within the meaning required of section 45 (2) of the Act.

If I reach that conclusion, it seems to me quite impossible to contend that the effect of the disclaimer was not to extinguish that right. Plainly, it did extinguish that right.

I come now to the third requirement, the words "at the expense of the deceased." It was contended on behalf of the

⁴ [1914] 1 Ch. 502.

⁵ [1943] Ch. 12.

⁶ *Ibid.* 15, 16.

⁷ [1914] 1 Ch. 502.

plaintiffs that those words inferred that there must be something like the person who extinguished the debt putting his hand into his pocket. I cannot see why there should be any such limitation. It seems to me that the words "at the expense of the "deceased" are not used in any technical manner but in an ordinary and natural manner which plainly seems to be covered by the definitions contained in the Oxford English Dictionary of "expense," in which the words "cost or sacrifice involved in "any course of action" are used. Consequently, it seems to me that this requirement is satisfied.

The fourth and remaining consideration is one which, perhaps, gives rise to more difficulty. It is to be regarded as a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished; it does not say it is to be regarded as a disposition made by the deceased in favour of the person who in fact benefits by the extinguishment of the debt or right, or anything of that sort. Consequently it seems to me that there was to be indicated some conscious intention on the part of the person who executed the disclaimer to benefit somebody else. It was pointed out by Mr. Pennycuick that this is part of an assumed transaction, a notional transaction, and not part of the actual transaction which was denoted at the beginning of the subsection. I do not think that will do; it will not get over the difficulty, because in the notional transaction the words are referring obviously to an actual person, the person for whose benefit a debt or right was extinguished. It is necessary, therefore, to find that there is some definite person for whose benefit the debt or right would be extinguished.

In the present case there is no evidence of any kind as to what were the intentions of Mrs. Stratton in disclaiming the benefits under her husband's will, though one cannot help having a strong suspicion that it was intended to confer a benefit on the sons, because there is no obvious reason otherwise why any such arrangement should have been entered into. I think that Mr. Pennycuick is right when he says that in a case of this kind one must apply the well-established rule and attribute to the person executing a transaction the intention to produce the results which naturally follow from the transaction in question. If, therefore, the result is to benefit the plaintiffs in the present case, one is entitled to presume that the intention of the execution of the disclaimer was to benefit those persons. If that be so, then it seems to me that the terms of the subsection are satisfied. Of course, there may be cases in which there would be no intention

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to benefit the persons who in fact would receive some advantage from the execution of the disclaimer; it might be because the legatee did not wish to receive any benefit from a testator because he or she regarded the property as tainted in some way or other, or had a personal dislike for the testator or something of that kind. In that case it seems to me that in the absence of any indication in the documents, evidence might be produced to rebut the presumption of intention of the result which I have mentioned. In the present case there is no such evidence. The presumption is not rebutted, and therefore I must presume that the disclaimer was executed for the purpose of benefiting the three sons.

In that case, they are the persons for whom the benefit of the debt or right was extinguished and they are to be treated as donees for the purpose of the subsection.

It was, of course, argued on behalf of the Revenue that no such intention was in fact necessary. It was sufficient if a benefit was merely conferred upon some person by reason of a disclaimer. I have already indicated that I do not think that that is the right construction, because the section is headed by the words which I have read: "Gifts by way of creation of burden or release of "right." Consequently, it seems to me that this is a case concerned with gifts, and that gifts involve the relationship between a donor and donee, and the words in section 45 (2) support that construction. Accordingly, the mere fact that there was a benefit was not in itself sufficient unless it can be said that the disclaimer was in fact intended or must be taken to have been intended to benefit certain persons.

In result I reach the conclusion that the duty is payable. There will be a declaration in the terms of the summons.

Declaration accordingly.

Solicitors: *Mackrell, Maton & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

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[1955 D. 1986.]

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Oct. 3, 4, 5;
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Will — Election — Bequest of property of third parties — Part owner benefiting under will — Doctrine of election applicable.

Lord
Evershed M.R.,
Birkett and
Romer L.JJ.

A testatrix by clause 4 of her will, made in 1950, devised to J. J., her grandson, "my two freehold houses in Beresford Road, . . ." By clause 5 she gave C. D., her son, another freehold house, and also the residue of her real and personal estate.

The testatrix had no disposable interest in the two freehold houses in Beresford Road, which she occupied merely as a life tenant under a deed of family arrangement made in 1939, by which C. D. became on her death in 1954 entitled to a half share of the beneficial interest in the houses, and J. J. and his brother, C. J., to a quarter share each.

J. J. claimed that C. D. must elect either in favour of the will and give effect to the devise to him, J. J., so far as possible, or against the will, and compensate J. J. to the extent of his (C. D.'s) interest under the will in respect of J. J. not receiving C. D.'s share of the two houses. C. D. contended that the doctrine of election did not apply, on the ground, inter alia, that he himself could not give effect to the devise, since a quarter share belonged to J. J.'s brother:—

Held, (1) that by clause 4 of the will the testatrix had intended to devise in favour of J. J. the freehold interest in the two houses in Beresford Road.

(2) That the doctrine of election applied, for it was not limited to cases where the person whose property was given away could, by abandoning his own title to or interest in that property, enable the purported gift to take full effect, and C. D. had to elect whether he would take under or against the will.

Cooper v. Cooper (1874) L.R. 7 H.L. 53 and *In re Lord Chesham* (1886) 31 Ch.D. 466; 2 T.L.R. 265 applied.

Brown v. Gregson [1920] A.C. 860 distinguished.

(3) That if C. D. elected to take under the will, his obligation was to make the other relevant disposition effective so far as he was able.

Per curiam. A class is not exempted from the principle of election merely because each can contribute only a part of the total subject-matter of the gift which the testator has purported to effect.

Decision of Danckwerts J. [1956] Ch. 357; [1956] 2 All E.R. 74 affirmed.

APPEAL from Danckwerts J.¹

The testatrix, Selina Dickey, who died on September 10, 1954, by clause 4 of her will made on October 18, 1950, devised to her

¹ [1956] Ch. 357; [1956] 2 All E.R. 74.

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grandson, James Julian: " my two freehold houses in Beresford " Road, Walthamstow. . . ." By clause 5 she gave to her son, Charles Dicey, her " freehold house known as 268, Higham " Road, Walthamstow " and the residue of her estate both real and personal.

The testatrix was not in fact the freeholder of any houses in Beresford Road, Walthamstow, but she had a life interest in two houses in that road, Nos. 68 and 70, which had formerly belonged to her husband, Charles Dicey, in fee simple. Charles Dicey died intestate on October 25, 1938, leaving a widow (the testatrix), a son (Charles Dicey), and two grandsons, James and Charles Julian, who were the children of a deceased daughter. In April, 1939, a deed of family arrangement was drawn up between the persons interested in the intestacy, but the document was destroyed by enemy action during the last war and there was no copy of it. By the terms of that arrangement the rents and profits of the two houses, Nos. 68 and 70, Beresford Road, Walthamstow, were to go to the testatrix for her life, and on her death the two houses, or their proceeds of sale, should belong as to one-half to Charles Dicey and as to one-quarter each to the two grandsons, James and Charles Julian.

The testatrix during the rest of her life after her husband's death was in fact in receipt of the rents and profits of the two houses and neither she nor her late husband ever had any interest in any other house or houses in Beresford Road.

On November 3, 1955, James Julian took out a summons in the Chancery Division asking, *inter alia*, whether Charles Dicey was bound to elect whether he would take under or against the will. The other grandson, Charles Julian, was not a beneficiary under the will of the testatrix and was not, therefore, a party to the proceedings.

Danckwerts J. held that the doctrine of election was applicable and that Charles Dicey had, therefore, to decide within a reasonable time whether he would take under the will the gift of the freehold house and the residue, renouncing in favour of James Julian his half interest in the proceeds of sale of Nos. 68 and 70, Beresford Road, or whether, as a term or condition of retaining his half interest in those houses against the terms of the will, he would compensate James Julian to the extent of the interest which he, Charles Dicey, received under the will in respect of the disappointment of James Julian in not receiving the properties in question.

Charles Dicey appealed.

J. H. Hames for Charles Dicey. Charles Dicey is not put to his election whether to take under or against the will. It is not sufficiently clear that by the gift of "my two freehold houses in "Beresford Road" the testatrix intended to give Nos. 68 and 70. She may, for example, have intended to purchase other houses in that road. A distinction must be drawn between this type of case, where the subject-matter of the gift is only identifiable by the reference to the interest of the donor, and the case where there is a sufficient description of the gift and in addition an erroneous description of the donor's interest in it, as in *In re Harris*.² There is no evidence as to what this testatrix believed to be the extent of her interest in these properties. She enjoyed the rents and profits, but that would not prove that she thought that she owned the freehold interest. If, however, she did mistakenly think that she was the freeholder, the gift fails in limine: *Galvin v. Devereux*³ and *Waters v. Wood*.⁴ If a testator shows a clear intention to give the absolute interest, but he has no interest or does not own the absolute interest, the gift fails. The principle in *In re Mulder*⁵ applies, though that was a partnership case. The intention of the testatrix must be ascertained from the will—it is inadmissible to draw inferences from the fact that she had an interest in these two houses in Beresford Road and in these two houses only. If the subject-matter of the gift is only identifiable by reference to the testatrix's interest in it the gift will fail if the interest is described incorrectly.

For the doctrine of election to apply in the case of a gift by will the party called on to elect must be in a position to give effect to the intention of the testator as declared in the will. In this case Charles Dicey cannot give full effect to the devise. If the testatrix had given the "two freehold houses or the proceeds "of sale thereof" it is conceded that even if the third party could not give all the proceeds of sale it might be said that by giving as much as he could that he would be satisfying the testatrix's intention and thus there might have been a case of election. But where the gift is the freehold, anything short of that is a gift of a different nature. The court is not called on to redraft the will by substituting a gift which is different from that contained in it.

The equitable doctrine of election is based on the presumption that the testatrix would not intend the legatee (Charles Dicey) to

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² [1909] 2 Ch. 206.³ [1903] 1 I.R. 185.⁴ (1852) 5 De G. & Sm. 717.⁵ [1943] 2 All E.R. 150.

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take a benefit under the will and yet refuse to comply with the requests contained in it, but the legatee cannot be required to comply with substituted requests. It must be within the power of the party put to his election to give effect to the testator's intention. If, for example, effect could be given to the intention to convey a freehold by putting an end to a trust for sale, a case for election would arise if it was within the power of the person taking under the will to put an end to the trust for sale.

In *Lissenden v. C. A. V. Bosch Ltd.*⁶ it was said that there was no difference between the Scottish doctrine of approbation and reprobation and the English doctrine of election.

It is significant that in *Brown v. Gregson*⁷ the court did not hold that the legatee had merely to make the greatest possible effort to comply so far as possible with the testator's intention.

Election does not arise if the donee cannot give effect to the devise: *In re Lord Chesham*.⁸ Where there is a specific gift—"my two houses"—then something else cannot be given in substitution for it. Lord Chesham could have made monetary compensation, but he was not put to his election, for the question of compensation does not arise until it has been shown that there is a case for election. Similarly, in *Douglas' Trustees v. Douglas*⁹ it was held that the donee must be able to carry out the terms of the will in order to be able to approbate the will, unless it is clear from the terms of the will that the testator would have been content with something less than exact compliance.

[BIRKETT L.J. The first edition of Jarman on Wills (1844), p. 387, referred to *Whistler v. Webster*¹⁰ and said that it was immaterial whether the testator knew or whether he was mistaken as to the extent of his interest; that is not in line with your contention that the legatee must be able to give the exact thing given by the will.]

It is conceded that election arises once the subject-matter of the gift is identified and if it is shown that the testator would have been satisfied with some variation of the terms of the will. In such cases the donee has merely to do his utmost to comply.

[LORD EVERSHERD M.R. What would be the position if the testatrix had made a gift to the third party interested in the devised property. If both were put to their election and both elected for the will effect could be given to the exact intention

⁶ [1940] A.C. 412, 417; 56 T.L.R. 347; [1940] 1 All E.R. 425.

⁷ [1920] A.C. 860.

⁸ (1886) 31 Ch.D. 466; 2 T.L.R. 265.

⁹ (1862) 24 D. 1191.

¹⁰ (1794) 2 Ves.Jun. 366a.

of the testatrix. Would there be a case for election in those circumstances?]

If it is possible to elect effectively a case for election arises.

[ROMER L.J. But it could not be said of either of the donees that, taken one by one, they could give effect to the intention of the testatrix.]

*In re Booth*¹¹ is not in point, for it is not clear that the question of election was ever argued; further, it was decided before 1925, when it was possible to have a legal estate jointly with others. And it was possible to compensate the other party by a money payment there. [Reference was made to *In re Ogilvie*.¹²]

[LORD EVERSHED M.R. That case appears to be different from *Brown v. Gregson*,¹³ which was decided later.]

*In re Nash*¹⁴ is distinguishable.

S. C. Silkin for James Julian. The observations of Lord Cairns L.C. in *Cooper v. Cooper*¹⁵ and of Lord Haldane in *Brown v. Gregson*¹⁶ show that the court should be reluctant to put any limitation on the doctrine of election if the result would be to engraft on it artificial distinctions. The defendant proposes to introduce two such artificial distinctions. The first is that there is a distinction between a gift of real property and one of personal property. The second is that the application of the doctrine should depend on whether a gift, however small, is given to a person owning part of the property in question: *In re Harris*.¹⁷

Once a case for election arises it matters not that one person elects for the will and another against it: *Fytche v. Fytche*.¹⁸ The defendant's argument is based on the proposition that no case for election arises unless the election will give complete and precise effect to the will. The decisions in *In re Booth*¹⁹ and *In re Ogilvie*²⁰ are inconsistent with that contention. Those were cases dealing with real property not subject to a trust for sale. There is no authority for drawing an artificial distinction between real and personal property: *Padbury v. Clark*.²¹

The present case is practically identical with *Cooper v. Cooper*.²² The cases on which the defendant relies illustrate a different principle. In the cases of foreign property and in the

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¹¹ [1906] 2 Ch. 321.

¹² [1918] 1 Ch. 492; 35 T.L.R. 218.

¹³ [1920] A.C. 860.

¹⁴ [1910] 1 Ch. 1; 26 T.L.R. 57.

¹⁵ (1874) L.R. 7 H.L. 53, 67.

¹⁶ [1920] A.C. 860, 868.

¹⁷ [1909] 2 Ch. 206.

¹⁸ (1868) L.R. 7 Eq. 494.

¹⁹ [1906] 2 Ch. 321.

²⁰ [1918] 1 Ch. 492.

²¹ (1850) 2 Mac. & G. 298.

²² L.R. 7 H.L. 53.

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Scottish case there was no choice. It is not possible to elect when there is no power to dispose of the property in question.

In *Brown v. Gregson*²³ the heir could not carry out substantially the effect of the will. In *Codrington v. Codrington*²⁴ the House of Lords referred to *Cooper v. Cooper*.²⁵ The principle underlying the doctrine of election was clearly stated by Sir George Jessel M.R. in *Rogers v. Jones*.²⁶ The present case is covered by his observations, which show that a person may be put to his election although he cannot exactly give effect to the will. The decisions in *In re Lord Chesham*²⁷ and *Whistler v. Webster*²⁸ show that the principle is that the obligation is to elect and make compensation so far as possible. The fact that precise effect cannot be given to the will does not alter the obligation. The decision of Danckwerts J. is right and in accordance with equitable principles.

J. H. Hames in reply. No case for election arises here. The principle of *In re Lord Chesham*²⁹ applies. Charles Dicey cannot elect because he does not get two freeholds under the will. In *Brown v. Gregson*³⁰ it was not possible to give effect to the will. The question is whether effect can be given to the will. If that cannot be done, then no case for election arises. Compensation is only made where it is possible to elect. If all of several individuals are liable to elect, they can do so severally. No case for election arises if all are not bound to elect. In *Cooper v. Cooper*³¹ the observations of Lord Cairns L.C. were obiter. The decision in *Brown v. Gregson*³² is to be preferred.

Cur. adv. vult.

Nov. 1, 1956. The judgment of the court was read by ROMER L.J. This appeal has raised, in a somewhat unusual form, the problem, not commonly encountered today, of the equitable rule of election under a will. [His Lordship referred to the clauses of the will set out above and continued:] The following facts were proved in evidence (and their admissibility is not open to challenge): (1) the testatrix's husband, who died intestate in 1938, had been the owner in fee simple of two houses in Beresford Road, Walthamstow, namely, Nos. 68 and 70; (2) after Mr. Dicey's death a family arrangement was come to (all written

²³ [1920] A.C. 860.

²⁴ (1875) L.R. 7 H.L. 854.

²⁵ L.R. 7 H.L. 53.

²⁶ (1876) 3 Ch.D. 688, 689.

²⁷ 31 Ch.D. 466.

²⁸ 2 Ves.Jun. 366a.

²⁹ 31 Ch.D. 466.

³⁰ [1920] A.C. 860.

³¹ L.R. 7 H.L. 53, 67.

³² [1920] A.C. 860.

record of which was lost as a result of enemy action) whereby the rents and profits of the two houses should belong to Mrs. Dicey, the testatrix, during her life but, subject to that life interest, the two houses (or their proceeds of sale) should belong as to one-half to the appellant and as to one-quarter each to the respondent and his brother, Charles Julian (who is not a beneficiary under Mrs. Dicey's will and is not a party to these proceedings); (3) the testatrix, Mrs. Dicey, in fact during the rest of her life after her husband's death was in receipt of the rents and profits of Nos. 68 and 70, Beresford Road; and (4) neither the testatrix nor her late husband ever had any interest in any other houses in Beresford Road.

In these circumstances the question has arisen whether the appellant, Charles Dicey, must elect either for or against the will; so that (in the former case) he must, as a term or condition of accepting the freehold house and his mother's residue, renounce in the respondent's favour his half interest in the proceeds of sale of the two houses; and (in the latter case) he must, as a term or condition of retaining his half interest in the houses, make compensation to the respondent for depriving him of that interest out of the testatrix's free property which she had devised and bequeathed to him.

Mr. Hames's first contention was to the effect that the language of clause 4 of the will was of so uncertain a character as not to give rise to election at all. It is true that the testatrix has not specified by number the two houses in Beresford Road, whereas the rest of her dispositions (other than of residue) specifically describe or identify their subject-matter. Mr. Hames has accordingly contended that the gift in clause 4 in favour of the respondent is wholly ineffective for all purposes (including that of raising any obligation of election in the appellant) either because it fails fairly to apply to Nos. 68 and 70, Beresford Road at all, or because, upon its true interpretation, it only purported to give to the respondent such interest in those properties (if any) of which the testatrix was competent to dispose.

Mr. Hames referred us to one or two authorities in support of this part of his argument. We hope he will forgive us if we do not refer to them in this judgment but express briefly our entire concurrence with Danckwerts J. in rejecting the contention. We are willing to assume that, if the gift should be construed as Mr. Hames suggests, then the conclusion would be in accordance with his argument. But it is in our judgment clear, in light of the admissible evidence to which we have alluded, that by

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clause 4 of her will Mrs. Dicey purported and intended to devise in the respondent's favour the freehold interest in Nos. 68 and 70, Beresford Road, Walthamstow—an interest which, upon her death, belonged in equity as to one-quarter to the devisee already, as to another quarter to his brother and as to the remaining half to the appellant.

Mr. Hames's second argument is, we think, of more substance and difficulty. It is to the effect that in such a case as the present the appellant is relieved of any obligation to elect because he cannot, if he elects to take the property given to him by the will, by any means in his control provide that the devise of Nos. 68 and 70, Beresford Road, should take effect strictly according to the terms of clause 4 of the will. By that clause the fee simple interest in the two houses is given to the respondent. The appellant's present interest in the houses is an absolute beneficial interest in one-half of their proceeds of sale. The most that he can achieve by a renunciation of his present interest in favour of his nephew is to secure for the respondent an absolute beneficial interest in three-fourths of the proceeds of sale of the houses, an interest not only less in extent but different in quality from the gift which the will purported to confer on the respondent. In other words, it is Mr. Hames's contention that election only arises when the person on whom the obligation falls can, if he elects in favour of the will, secure that the relevant provisions of the will take effect precisely according to their terms.

We must confess for our part that if this contention is well founded, then the so-called rule of equity known as election appears to be bereft of much of its title to be described as equitable. For the obligation to elect would depend upon the chance of the existence of some interest in the property, which the will purports to devise, in a third party (not himself a beneficiary under the will and not therefore in any event called upon to elect), however small such interest might be. Further, the result in such a case as the present would be unaffected by the circumstance that in the event of election against the will there would be no difficulty at all in the way of making adequate compensation to the disappointed devisee or legatee.

It appears, however, that no case has yet been before the courts in which the precise point now raised has been determined. It becomes accordingly necessary to consider the true character of the rule. The case of *Cooper v. Cooper* in the House of Lords¹

¹ (1874) L.R. 7 H.L. 53.

concerned a testatrix upon whom had been conferred a limited power of disposition over an estate known as Pain's Hill. The testatrix, having in her lifetime effectively appointed the estate equally in favour of her three sons, purported to appoint it by will to her eldest son, giving benefits to her other surviving son and her two grandchildren, the issue of the third son, who had predeceased the testatrix and died intestate. It was conceded that her appointments by will were inoperative, and the eldest son then called upon his brother and the two grandchildren (who took their deceased father's appointed share) to elect. The brother submitted so to do but the two grandchildren resisted the claim. It was held that they were bound to elect.

Lord Cairns L.C. thus stated the matter at the beginning of his speech²: "My Lords, in that state of things, the testatrix "not owning Pain's Hill, and having no disposing power over it, "her attempt to dispose of it by her will clearly would raise a "case of election against any person who, taking under her will, "might be found to have an interest in the Pain's Hill estate. "And before I examine the effect which that principle would "have upon the appellants in this case, I would take the liberty "of reminding your Lordships of two expressions of the general "rule of the court on this subject, the one contained in the case "of *Streatfield v. Streatfield*,³ and expressed by Lord Talbot, "and the other in the case of *Noys v. Mordaunt*,⁴ expressed by "Lord Keeper Cowper. Lord Talbot says⁵: 'When a man takes "upon him to devise what he had no power over, upon a sup- "position that his will will be acquiesced under, this court "compels the devisee, if he will take advantage of the will, to "take entirely, but not partially under it, as was done in *Noys v. Mordaunt*,⁶ there being a tacit condition annexed to all "devises of this nature, that the devisee do not disturb the "disposition which the devisor hath made'; and Lord Keeper Cowper says, in the earlier case of *Noys v. Mordaunt*,⁷ 'In all "cases of this kind, where a man is disposing of his estate "amongst his children, and gives to one fee simple lands, and "to another lands entailed or under settlement, it is upon an "implied condition that each party acquit and release the "other.' "

² L.R. 7 H.L. 53, 62.

³ (1735) Cas.temp.Talb. 176.

⁴ (1706) 2 Vern. 581.

⁵ Cas.temp.Talb. 176, 182.

⁶ 2 Vern. 581.

⁷ Ibid. 582.

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In *In re Lord Chesham*⁸ the question arose in the case of a purported disposition by a tenant for life of heirlooms. It was held by Chitty J. that no question of election arose since the tenant for life could by no means either in his lifetime or by his will make any disposition of the heirlooms, so that his purported disposition of them must in any event and for all purposes be wholly ineffective. But in the course of his judgment (the correctness of which has never since been doubted) that very learned judge more than once expressed the principles to be applied in such cases. Thus⁹: "It is clear that if he takes "under the will he must confirm the will so far as he can, and "must give up to the disappointed legatees any beneficial interest "that he can dispose of in the chattels. . . ." The language, upon the face of it, indicates that the obligation is limited by the extent to which the beneficiary electing for the will is able to give effect to its other relevant disposition. It is not suggested that the obligation depends upon the power of such beneficiary to secure that the other relevant disposition takes effect according to its exact terms.

Again, the judge says¹⁰: "The principle on which the doctrine of election is based is that a man shall not be allowed to "approve and reprobate; that if he approves he shall do all "in his power to confirm the instrument which he approves. . . ." He continues¹¹: "In *Wollaston v. King*¹² "James L.J., then Vice-Chancellor, after stating that he had "endeavoured to extract from the cases a principle, adopted the "rule laid down by the Master of the Rolls in *Whistler v. Webster*¹³ in the following general terms, namely: 'That no man "shall claim any benefit under a will without conforming, as "far as he is able, and giving effect to everything contained in "it whereby any disposition is made showing an intention that "such a thing shall take place.'" And finally¹⁴: "In *Codrington v. Codrington*¹⁵ Lord Cairns L.C. states the law thus: 'By "the well-settled doctrine which is termed in the Scotch law "the doctrine of "approve" and "reprobate," and in our "courts more commonly the doctrine of "election," where a "deed or will professes to make a general disposition of property "for the benefit of a person named in it, such person cannot

⁸ (1886) 31 Ch.D. 466; 2 T.L.R. 265.

⁹ 31 Ch.D. 466, 472.

¹⁰ Ibid. 473.

¹¹ Ibid. 474.

¹² (1868) L.R. 8 Eq. 165, 174.

¹³ (1794) 2 Ves.Jun. 366a.

¹⁴ 31 Ch.D. 466, 474.

¹⁵ (1875) L.R. 7 H.L. 854, 861.

“ ‘accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.’ ”

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Though the language last cited might at first sight appear to go somewhat further in support of Mr. Hames's contention, it is clear in our judgment in its context that it does not lay down, and was not thought by Chitty J. to lay down, any rule to the effect that the obligation to elect was limited to cases in which the party so bound, if he chose to accept the will, was able by his renunciation to make the other relevant provisions take effect precisely according to their terms.

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If the matter, then, rested on these cases alone, there could be no doubt, in our view, that the conclusion of Danckwerts J. was correct.

Viscount Maugham pointed out in *Lissenden v. C. A. V. Bosch Ltd.*¹⁶ that the English rule is the same as that in Scotland of approbation and reprobation: and in its simplest terms the rule would amount to no more or no less than this—that one who is given a benefit under a will but whose property the testator purports to give to someone else must make up his mind whether he will take under (or approbate) the will or whether he prefers to adhere to his already existing proprietary claim and renounce (or reprobate) the testamentary disposition. If the rule can properly be stated in these simple terms, then, in the former event, the obligation of him who approbates the will must be, by renouncing his outside interest, to let the will wholly take effect so far (to adapt Chitty J.'s language) as the renunciation of that outside interest permits him so to do.

But Mr. Hames drew our attention also to another case in the House of Lords, *Brown v. Gregson*,¹⁷ and certain language used by the noble Lords in their opinions in that case does at first sight appear to support his argument.

In that case a Scottish testator left the residue of his property in trust to be divided amongst his seven children, directing that this provision was to be accepted in full of legitim with certain ancillary and consequential provisions. The testator settled the share of a daughter (Mrs. Gregson) upon her for life with remainder to her children. Part of the testator's estate consisted of land in the Argentine. It was found¹⁸ that the law of that

¹⁶ [1940] A.C. 412, 417; 56 T.L.R. 347; [1940] 1 All E.R. 425.

¹⁷ [1920] A.C. 860.

¹⁸ *Ibid.* 862.

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country which governed the disposition of immovables there only permitted a testator to dispose by will of one-fifth of his immovables in Argentina, the remaining four-fifths passing to his children as of right on his death. Furthermore, that law did not permit trusts or contracts which would restrict the free disposal of land by its owner: nor could a testator appoint heirs to his heirs of such land, and the heir who became owner could not bind himself not to dispose of that land. Mrs. Gregson claimed legitim and forfeited her interest under the will and her children claimed that the other six children of the testator should surrender to the trusts of the will the shares of land which passed to them under the Argentine law as a condition of taking their share of the residue of the property of the testator in Scotland. In the circumstances, the majority of the House held that the Scottish rule of approbation and reprobation was excluded: since it was not possible in conformity with the local Argentine law for one who sought to claim under the will to give effect by any means to the testator's intention in the Argentine. There was a complete impossibility of making the Argentine lands or their proceeds available to the use of the settlement save by some wholly independent and original transaction which, if it did not offend at least against the spirit of the Argentine law, would be wholly distinct and different in character from the testator's dispositions.

Thus, in the course of his opinion, Viscount Haldane—and these were the passages particularly relied upon by Mr. Hames—had said ¹⁹ of the view of the Court of Session which he affirmed: "The Court of Session held that the heir was not put to any election, because the court must be satisfied, in order to put him to it, that it was in his power, by waiving his objection to the will, or refusing to make a claim adverse to it, to perfect the right of those who would make title under the will." Again, he said ²⁰: "He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is prima facie entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock." And then, after referring to *Cooper v. Cooper* ²¹ and *In re Lord*

¹⁹ [1920] A.C. 860, 866.

²¹ L.R. 7 H.L. 53.

²⁰ Ibid. 868.

Chesham,²² he concluded as follows²³: "If this be so, the question in the present case is simply whether the law governing the title to the testator's Argentine land permits the appellants to comply with the directions of the trust disposition. It seems to me clear that it does not. It is said that the appellants could sell their land or convey it to the trustees under the disposition. But they could not by doing so bring it effectively under the scheme of the instrument. If they were to try to do so the trustees would either not get the land itself, or would get it free from any binding trust. The law of the Republic strikes at such a transaction as the settlement directs, and does not allow the title to be made which the testator directed. It is plain that it is this law which must govern the validity, not only of the disposition but of the trusts sought to be engrafted on the title to the Argentine land, and of the directions to be carried out with regard to it. In this state of matters, to say that the appellants were bound to elect, or that they are reprobating the instrument by not doing what the law will not allow them to do, appears to me, both on principle and authority, to be wrong."

To the same effect was the language of Viscount Finlay, who, in the course of his speech, rejected, as Lord Haldane had done, the suggestion that sufficient effect could be given to the testator's intentions by a sale of the Argentine land and a settlement of the proceeds. "The immediate sale of the land," he said,²⁴ "and the settlement of the proceeds of the sale of the land is something quite different from the interest in the land in specie for which the testator provided until the trustees should think a sale expedient." We do not think it necessary to cite further from Lord Finlay's speech, but he made citations,²⁵ particularly from another Scottish case of *Douglas' Trustees v. Douglas*,²⁶ which included the reference in the rubric: "Opinions, that a party cannot be said to reprobate a deed who is not put to his election by the will, express or implied, of the granter of the deed, and who is not free to approbate, and capable of approbating cum effectu."

From these passages Mr. Hames contended the law to be that election did not arise unless the party electing under the will was in a position quoad the other relevant disposition to make it

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²² 31 Ch.D. 466.²⁵ *Ibid.* 877.²³ [1920] A.C. 860, 870.²⁶ (1862) 24 D. 1191.²⁴ *Ibid.* 875.

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precisely effective: and he so sought to translate the two Latin words *cum effectu*.

In our judgment, however, the speeches in *Brown v. Gregson*²⁷ must be read in the context of the special and peculiar circumstances presented by Argentine law. In our view, the basis of the decision was that, by reason of that law, those claiming under the will were wholly disabled from making the testator's dispositions concerning Argentine land effective at all or by any relevant means.

Lord Haldane, who, as we have said, referred to the judgment of Chitty J. in *In re Lord Chesham*,²⁸ nowhere indicates any criticism of the general principles which Chitty J. had expounded. Moreover, Lord Haldane had, at the beginning of the paragraph from which we have made the second citation of his speech, endorsed the view which Chitty J. had expressed that the obligation of him who elected under the will was to make the other relevant disposition effective "so far as he was able"; for Lord Haldane had there said of the doctrine of election²⁹: "It is a principle which the courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument."

It is further to be observed that the suggested limitation of the doctrine of election to cases in which the person whose property is given away can, by abandoning his own title to or interest in that property, enable the purported gift to take full effect according to its precise terms is inconsistent with the manner in which the doctrine has been applied by long established authority. It was recognized in *Cooper v. Cooper*³⁰ and was expressly decided in *Fytche v. Fytche*³¹ that if two or more persons are called upon to elect, each of them has not only an individual obligation but an individual right to elect and can exercise it independently of the way in which the right may be exercised by the other or others.

The significance of this in relation to Mr. Hames's argument is apparent from the following illustration. A testator gives Blackacre or the proceeds of its sale to A. Blackacre in fact belongs to B, C and D as joint tenants and the testator gives legacies to each of these persons. Each of them has a separate and individual right and obligation to elect for or against the will, notwithstanding that the gift to A can only take full effect

²⁷ [1920] A.C. 860.

²⁸ 31 Ch.D. 466.

²⁹ [1920] A.C. 860, 868.

³⁰ L.R. 7 H.L. 53.

³¹ (1868) 7 Eq. 494.

according to its terms if B, C and D all elect in favour of the will. In other words, a class is not exempted from the principle of election merely because each can contribute only a part of the total subject-matter of the gift which the testator has purported to effect.

For the above reasons we are of opinion that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Craigien, Wilders & Sorrell; Montlake & Co.*

E. D.

In re POWELL-COTTON'S RESETTLEMENT.
HENNIKER-MAJOR *v.* POWELL-COTTON.

[1954 P. No. 3162.]

Company — Shares — Description of classes of shares — “Preferred ordinary” — Investment clause in settlement — Power to invest in “ordinary preferred stock or shares” — Subdivision of ordinary stock with preferential rights — “Preferred” — “Preference” — “Deferred.”

The investment clause of a settlement made in 1940 contained a power to invest in “ordinary preferred stock or shares but not “on deferred stock or shares of any such company.” That part of the clause appeared in the editions of Key and Elphinstone's *Precedents in Conveyancing* from 1899 until 1940 inclusive, and accordingly in the edition current at the date of the settlement:—

Held, that “ordinary preferred stock” meant a sub-class of ordinary stock, which had some preference or priority over another sub-class of ordinary stock.

ADJOURNED SUMMONS.

The investment clause of a resettlement dated January 31, 1940, so far as material provided: “12. Capital money arising “under the Settled Land Act, 1925 or deemed to be or to “represent capital money arising under the said Act may be “invested or applied wholly in one or partly in one and partly “in another or others of the following modes namely:—(i) Invest- “ment in or upon . . . stock of the Bank of England or “Metropolitan or London County stock or in or upon the debentures debenture stock or rent-charge guaranteed or preferred “stock or shares of any company incorporated by special Act or

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"by or under any public general Act or Acts of the Imperial Parliament or the Legislature of any colony" [the word "colony" was extensively defined in an earlier part of the clause] "or Royal Charter or in or upon the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the Government of the United Kingdom or India or any colony or any foreign government or State or in or upon ordinary preferred stock or shares but not on deferred stock or shares of any such company. . . ."

The trustees of the settlement by this summons asked the court to determine, *inter alia*, whether in clause 12 (i) of the settlement the term "ordinary preferred stock or shares" meant (a) ordinary or preferred stock or shares; or (b) preferred ordinary stock or shares; or (c) preferred stock or shares not being participating preferred stock or shares; or had some other meaning.

P. W. E. Taylor for the trustees of the settlement.

G. A. Rink Q.C. for two beneficiaries, one a tenant for life and one a reversioner. The investment clause in this case was clearly based on a precedent which has been in all editions of *Key & Elphinstone's Precedents in Conveyancing* from the sixth edition in 1899 until the 14th edition in 1940 (inclusive), although there has been a change in the 15th edition. There is one difference between the form in the settlement and that in *Key & Elphinstone*: in the first part of the clause giving power to invest in "preferred" shares, the form in *Key & Elphinstone* has "preference" instead of "preferred" shares.

There are not, and, so far as one can find, never have been, shares known as "ordinary preferred," and the words "ordinary preferred" ought to be read as "ordinary" or "preferred."

[*ROXBURGH J.* You must satisfy me that it is not capable as it stands of any intelligent meaning, and that there is a *lapsus calami* in the precedent and in regard to the settlement.]

The investment clause as a whole is so repetitive that each part of it must be construed independently. Construing the crucial phrase by itself, there is an obvious omission if it expressly allows investment in some kind of preferred shares and expressly forbids investment in deferred shares, for nothing is in that case said about ordinary shares. It is clear that the phrase must have been intended to apply to the three classes of shares—preferred, ordinary and deferred—and to allow the first two while forbidding the last.

[ROXBURGH J. Surely "ordinary preferred" is a reference to a particular class of ordinary shares. If you divide category A into two sub-categories you normally put the A first and call them A1 and A2 and not 1A and 2A.]

One may do so in a heading but not in a description of sub-classes in words in the middle of a sentence.

Michael Browne for the three infant beneficiaries. The form of this clause has been in use substantially since 1899 and it is clear that Key & Elphinstone was the source from which it was taken. The clause authorizes investment in a particular category of ordinary shares, and even if there were a slip in Key & Elphinstone it is quite clear that the draftsman of this particular settlement wanted to use the words that actually appear in Key & Elphinstone. This settlement cannot therefore be treated as omitting a word which the settlor wished to have inserted.

In *Andrews v. Gas Meter Co.*¹ the Court of Appeal held that a company having no authority under its memorandum or articles of association to create any preference between different classes of shares may by special resolution alter its articles so as to authorize the directors to issue preference shares by way of increase of capital. That case may explain an increase in popularity of preferred and deferred ordinaries between the dates of the fifth and sixth editions of Key & Elphinstone.

ROXBURGH J. The question which I have to determine arises on part of an investment clause in a settlement, and its importance arises from the fact that in some respects, though not in all, it follows a precedent which must have been adopted in thousands of settlements, and yet on analysis could hardly be described as artistic.

[His Lordship read the material words of clause 12 (i) of the settlement and continued:] In the earlier part of the clause are the words "guaranteed or preferred stock or shares." That is a departure from the precedent in respect of the word "preferred," and, therefore, does not raise any question of general importance. But I have already held—although the point was never really argued, because there was no opposition on that question—that a preferred stock was a stock which had some preference or priority over the ordinary or common stock. There is no difference in my judgment, on a logical analysis, in this context between the meaning of the words "preferred" and "preference."

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¹ [1897] 1 Ch. 361; 13 T.L.R. 199.

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This investment clause in fact extends far outside the United Kingdom, but the settlement has to be construed as an English settlement, in which, presumably, English words must bear their natural meaning, and be related, at any rate in the first instance, to English company practice. I am not going to complicate my language by adopting or referring to some different terminology which is commonly or often used in other English speaking countries, although I have already mentioned one when I referred to common stock, which is an unusual phrase in England, but certainly not unusual in the United States or Canada.

In England it is usual, though not universal, to classify shares in relation to ordinary shares. Normally, though by no means invariably, the order of classification is that preference shares rank above ordinary shares, and deferred or founder or management shares rank below ordinary shares. In that context, the language dealing with these three categories or classes of shares is related to ordinary shares which stand in the middle. At some time there developed the practice of splitting the class of ordinary shares in such a manner that some part of the ordinary class was preferred to some other part of the ordinary class. In other words, it was not the creation of a new class but the sub-division of the ordinary class into two categories, one of which had priority over the other within the class. It may be—but I am not so holding—that the practice first began in the case of British railway stocks. This much is quite certain, that in the year 1935 and onwards there were millions of pounds worth of capital in British railway stocks to which the designations “preferred” “ordinary” and “deferred ordinary” were applied. I should be surprised if this were not the result of some or other of the sub-divisions of ordinary shares being split into preferred ordinary shares and deferred ordinary shares. If a company took power to split its capital under its memorandum, it had power to do so under the Companies Acts. Of course, British railway companies were not incorporated under the general Companies Acts, and it is not necessary to consider exactly by what machinery they split their shares. So far as companies incorporated under the Companies Acts were concerned, it is clear that at all times, if the memorandum gave the power to split, splitting was possible under the Acts. Anybody interested in the question (it is only indirectly relevant to the question which I have to decide) will find a good deal of illumination on the subject in *Andrews v. Gas Meter Co.*¹ It was only about 1897 that it became settled that a company

¹ [1897] 1 Ch. 361; 13 T.L.R. 199.

could take this power by an alteration in its articles. I cannot help thinking, though this is pure guesswork in this extremely ill-documented case, that it was that decision which created some stir in the minds of the editors of Key & Elphinstone, because this, to my mind, rather extraordinary phrase "ordinary preferred stock or shares" first made its appearance in the sixth edition of Key & Elphinstone's *Precedents in Conveyancing*, which was published in 1899. It is not to be found in the fifth edition, published in 1896. It last appeared in the fourteenth edition of that well-known book, published in 1940, and it was in the edition current when this settlement was executed.

It seems to me that that circumstance makes it quite impossible for me to say that these words represent a lapsus calami. If the phrase had not been intended, I do not think it could have survived all those editions of such a well-known precedent book without any criticism and, without any explanation, or deletion. There is not a word of comment upon those words to be found anywhere.

I have not the least doubt in my own mind that the draftsman of this document deliberately inserted those very words in this settlement. And why not? Strictly speaking—and I toy with the idea that perhaps the draftsman of the precedent was more interested in logic than in dealings on the Stock Exchange—in logic the phrase "preferred ordinary" is a contradiction in terms, because if it is "preferred" it is not "ordinary."

On the other hand, logically, if ordinary shares are divided into two sub-classes, one sub-class having a preference over the other sub-class, one would call them ordinary preferred stock and ordinary deferred stock. Many people would do that in exactly the same way as if the category or class were A and one wanted to divide it into two sub-classes, they would be called A1 and A2 and not 1A and 2A. On the other hand, the reason why city men on the Stock Exchange did the opposite is equally obvious. The important thing for business purposes was to distinguish the two sub-classes one from the other, and for that reason the distinguishing sub-class is put ahead of the original class in denoting shares. All these are only broadly descriptive titles. For the precise position it is necessary to look in every case at the instrument conferring the rights. Therefore, it seems to me that the phrase "ordinary preferred stock" is logically a lawyer's description of what the market, for equally good reasons, called "preferred ordinary stock." It seems to me that there is no real ambiguity about it at all, and that there is nothing logically wrong

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in that conclusion. No doubt, if a bracket were put round the word "preferred" it would be still more obvious, but the bracket is not there, and, in my judgment, it is not needed. Whether or not there are many preferred ordinary stocks now, I do not know; the evidence is singularly fragmentary on the point. But there were millions of pounds worth in 1935, and I have no reason to suppose there were not millions of pounds worth at the time this settlement was executed. There is, therefore, no question of trying to find something to which it could refer. It is obvious to what it refers. In my judgment, therefore, "ordinary preferred stock" is a sub-class of ordinary stock which has some preference or priority over another sub-class of ordinary stock.

I want to say a word about the phrase "deferred stock." I think that there is some doubt about the precise meaning of the words "deferred stock" in this clause. But it is not important, because what any trustee has to discover is not what is the ambit of the phrase, but what is the ambit of the power. It is quite certain that, if he is not allowed to invest in any form of stock which cannot be described as having any preference or priority over any other ordinary stock, he could not invest in deferred ordinary stock. I need not therefore trouble to consider whether the words "deferred stock" in this clause ought to be read as "deferred ordinary stock." No doubt that is what at first blush one would expect, but on closer analysis I am not sure that it is so, because deferred stock *prima facie* does not mean a sub-division of ordinary stock, but a different class, a class postponed to ordinary stock. It may well be that "deferred stock" in this context has that meaning, but on any view it was not necessary to put it in so far as I can see, and, therefore, it does not appear to me to matter very much what it means, and I will not explore the question any further. It may mean "deferred stock" strictly so called, or it may mean "deferred ordinary stock." I do not know, but it does not matter.

All that I have decided is what I have already plainly indicated. Accordingly, I will declare that in clause 12 (i) of the settlement the term "ordinary preferred stock or shares" means a sub-class of ordinary stock which has some preference or priority over another sub-class of ordinary stock.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie.*

I. G. R. M.

In re SOMECH, DECED..WESTMINSTER BANK LTD. *v.* PHILLIPS AND OTHERS.1956
Oct. 17.Upjohn J.

[1955 S. 5305.]

*Infant—Property—Right to receive—Share of residuary estate under will—Direction in will for payment of share to infant—Whether trustee bound to make payment on sole receipt of infant.**Chancery Division — Jurisdiction — Infant — Proposed transaction affecting property of infant—Discretion of court to authorize transaction or not.*

A will provided that a portion of the testator's residuary estate should be held on trust to accumulate the income for the benefit of the children of his daughter who should attain 21 or marry, and so that each beneficiary "when he or she shall attain the age of 21 years or shall marry shall be paid his or her share [of the "portion of residue] and of the accumulations of income . . ." The only beneficiary, a granddaughter of the testator, having married at 18, the trustee paid to her the accumulation of income in reliance on section 21 of the Law of Property Act, 1925. On the hearing of a summons praying for the directions of the court with regard to the disposal of the capital:—

Held, that the trustee had a discretion whether or not to transfer the capital to the infant; and, that discretion having been surrendered to the court, the court had an inherent jurisdiction with regard to the property of infants enabling it to inquire whether any proposed transaction was for the benefit of the infant or would be improvident, and the question should be adjourned into chambers accordingly.

ADJOURNED SUMMONS.

By his will, dated May 7, 1937, the testator, David Eliahoo Somech, gave, by clauses 10 and 11, one half of a moiety of his residuary estate on trust to pay the income thereof to his daughter, Vera Juliette Simberg, with remainder to her children, and the other half on trust to accumulate the income thereof for the benefit of her children who should attain the age of 21 years or marry "And so that each child of my said daughter when he "or she shall attain the age of 21 years or shall marry shall be "entitled to be paid his or her share of the said moiety of the "said share and of the accumulations of income thereof down to "the date of payment." On December 31, 1937, the testator died. On July 17, 1955, the daughter's only child (hereinafter called "the granddaughter"), who was born on March 17, 1937, married, whereupon Westminster Bank Ltd., the executor and

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trustee of the will, paid the accumulations of income to her in reliance on section 21 of the Law of Property Act, 1925.¹

By this summons, which was taken out on December 30, 1955, and to which the daughter, the granddaughter and all other beneficiaries under the will were defendants, the trustee asked, *inter alia*, (1) whether, on the true construction of the will and having regard to the granddaughter's infancy, the trustee was bound to pay to her, on her sole receipt, the share of the capital of the residuary trust fund which, under the terms of the will, she became entitled to be paid on her marriage, or whether the court had a discretion whether to authorize the payment or not; (2) should it be held that the court had that discretion, whether the trustee should forthwith pay that share to her on her sole receipt, or retain it until she attained the age of 21 years, and meanwhile pay her the income of it, or pay it into court to her credit, or deal with it in any, and if so, what other manner.

T. K. Wigan for the trustee. The words "and so that each child of my said daughter when he or she shall attain the age of 21 years or shall marry shall be entitled to be paid his or her share of the said moiety of the said share and of the accumulations of income thereof down to the date of payment" enable the trustee to pay the capital to the granddaughter and to obtain a good discharge: *In re Deneker*²; Jarman on Wills, 8th ed., p. 117. [Reference was also made to Halsbury's Laws of England, 2nd ed., vol. 17, p. 621.] Strictly, payment cannot be made to an infant; but words must be construed in their context (*In re Vestey's (Baron) Settlement*³), and in the present case the payment is expressly authorized. Whatever the trustee's discretion be, however, it wishes to surrender that discretion to the court, and asks the court to exercise its inherent jurisdiction to inquire whether payment now or on her attaining the age of 21 years is more beneficial to the infant, and to make an order accordingly.

Claud G. Allen for the beneficiaries. If a female infant be expressly entitled under a will to payment of a sum on marriage, that is sufficient for the court to order payment of it to her on

¹ Law of Property Act, 1925, s. 21: "A married infant shall have power to give valid receipts for all income (including statutory accumulations of income made during the minority) to which the infant may

"be entitled in like manner as if the infant were of full age."

² [1895] W.N. 28; sub nom. *In re Denekin* (1895) 72 L.T. 220.

³ [1951] Ch. 209; [1950] 2 All E.R. 891.

marriage: *In re Hall*.⁴ Payment of the capital could properly be made to the infant in the present case immediately: *Cooper v. Thornton*.⁵ [Reference was made to *Bilson v. Saunders*,⁶ *In re Cardross's Settlement*,⁷ *In re Birchall*⁸ and *Ledward v. Hassells*.⁹] On the authorities, the court has an inherent jurisdiction to inquire whether any proposed transaction affecting an infant will be improvident: *In re Parsons*.¹⁰ Accordingly, the court is asked to decide whether it is best that the capital be paid to the granddaughter now or when she attains 21 years of age.

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UPJOHN J. This summons raises an interesting point as to the right of an infant to receive a share of residue where there is a special direction in the will for that purpose. The question arises under the will, dated May 7, 1937, of David Eliahoo Somech, who died on December 31 of that year. I need only refer to one clause in the will which deals with the disposition of his residuary estate. He gave half of a moiety of his residuary estate on trust to pay the income thereof to his daughter, the defendant Vera Juliette Simberg, for life, with remainder to her children, and the remaining one half of that moiety he gave on trust to accumulate the income thereof for the benefit of the children of Vera Juliette Simberg who should attain the age of 21 years or marry.

Now follow the important words "And so that each child of "my said daughter when he or she shall attain the age of 21 "years or shall marry shall be entitled to be paid his or her "share of the said moiety of the said share and of the "accumulations of income thereof down to the date of payment." Mrs. Simberg has only had one daughter, the defendant Tanya Morgan, and she married on July 17, 1955. The share in question—that is the one half share of the moiety—amounts to about £13,000.

On her marriage the trustee paid to her the accumulations of income, relying on section 21 of the Law of Property Act, 1925. The question is whether, having married, she was entitled to have the capital paid to her notwithstanding that she will not attain the age of 21 years until March 17, 1958.

The authorities and the textbooks make this clear: that, where a direction is given by a testator that the legacy or share

⁴ [1903] 2 Ch. 226, 235.

⁵ (1790) 3 Bro.C.C. 96.

⁶ (1727) Bunbury 240.

⁷ (1878) 7 Ch.D. 728.

⁸ (1880) 16 Ch.D. 41.

⁹ (1856) 2 K. & J. 370.

¹⁰ [1940] Ch. 973; 57 T.L.R. 23;
 [1940] 4 All E.R. 65.

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of residue can be paid to a person under the age of 21 years, for example, at a fixed age, such as 17, or on marriage, the trustees may quite properly comply with that direction, and will get a good discharge from the legatee or the person entitled to the residue notwithstanding infancy. That is clear from the ancient case of *Cooper v. Thornton*,¹ and *In re Deneker*,² a decision of North J. I think that the law is accurately stated in one sentence in *Simpson on Infants* (1926), 4th ed., p. 41: "An infant is incapable of giving a legal discharge for money paid to him unless the instrument of donation specially provides that his receipt shall be a discharge, or directs payment (e.g., of a legacy) at an earlier age than 21." Thus, it is not in doubt that the trustee, the plaintiff bank, could properly have made a transfer of this half moiety. It is equally not in doubt that I can make an order, the trustee's discretion having been surrendered to this court.

The point with which I now have to deal is this. Has an infant an absolute right to the transfer of her property on marriage—in the same way as if she had attained 21—or is there a discretion vested in the trustee and in the court to withhold payment until she is 21, notwithstanding that a married infant can by the terms of the will give a discharge for the share of residue?

On that matter the authorities and the textbooks appear to be silent. I have been referred to one case, *In re Hall*.³ That case went to the Court of Appeal, but on looking at the argument one sees that the only question was whether the trustees or executors could make a valid appropriation of an investment to satisfy a contingent legacy of a certain amount, so that, on the happening of the contingency, if the investment had depreciated (as it had in that case), the legatee must, nevertheless, be satisfied with the investment, or whether the legatee was entitled to the full amount of the legacy. The latter was held to be the law. It is true that Cozens-Hardy L.J. finished his judgment by saying this: "There must be a declaration that each of the three god-children is entitled to receive £1,000 cash on attaining 21, or if a female marrying under that age"—that being, of course, the terms of the legacy. It was suggested that that showed that the Court of Appeal considered that on marriage a female would be absolutely entitled to that sum and could make

¹ (1790) 3 Bro.C.C. 96.

³ [1903] 2 Ch. 226, 235.

² [1895] W.N. 28; sub nom. *In re Denekin* (1895) 72 L.T. 220.

a demand for it. I cannot so read that decision. The question of the right of the infant to give a receipt was not argued or discussed before the court. What the court decided was that, on the contingency happening, the legatees were entitled to receive each their £1,000 and not a security which had depreciated. The court was not in the least degree concerned with the question whether a married infant could give a valid receipt or whether the money would have to be paid into court. Nor does a research into precedents in the books yield any light on the matter. Of course, there are a number of precedents to be found providing for a married infant giving a good discharge; but that is not the point which I have to consider. This married infant is not a ward of court, and it really comes down to the question whether this court has an inherent jurisdiction with regard to the property of infants enabling it to inquire whether any proposed transaction is for the benefit of the infant or would be improvident. I think this court has that jurisdiction. As I have said, no one doubts that in a proper case the infant can give a discharge. The trustee has a discretion, which it has surrendered to this court, and I think that it is now my duty to go into the question and see whether it would be for the benefit of the infant that this substantial sum should be paid to her now or in 18 months time, when she will have an absolute right to the payment of it. I think that that is as far as I can go.

[The summons was then adjourned into chambers.]

Declaration accordingly.

Solicitors: *Blyth, Dutton, Wright & Bennett; William Charles Crocker.*

K. R. A. H.

HALSALL AND OTHERS v. BRIZELL AND ANOTHER.

[1955 H. 2372.]

1956
Nov. 29.

Upjohn J.

Restrictive Covenant — Positive covenant — Enforcement — Building scheme — Covenant by purchasers of plots on behalf of themselves and their successors to pay annual levy to defray expenses of maintaining roads, sewers, promenade and sea wall—Positive covenant

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not running with the land—Whether levy enforceable per se—Appropriate levy to be decided by annual meeting of plot owners—Resolution to increase levies on tenements on plots divided into flats—Enforceability.

On May 3, 1851, 40 acres of land which afterwards became Cressington Park, Liverpool, were purchased by O. and J. for an estate in fee simple. This land was subsequently sold off by them in 174 building plots, but there remained vested in O. and J. the roads and sewers built thereunder, made in the park, a promenade and sea wall. A deed of covenant dated August 19, 1851, which was made between the several owners of plots of the one part and O. and J. of the other part, after reciting, inter alia, that O. and J. were trustees for the several and respective persons parties thereto, provided: “. . . *Seventhly.* That each and “every of them the said persons parties to these presents and his “respective heirs executors administrators and assigns shall and “will from time to time contribute and pay a due and just proportion in respect of the plot . . . of land in the said plan [drawn “upon the deed] marked with his name . . . and of the dwelling- “house on each such plot erected or to be erected in common with “the owners of the several other plots of land described in the “said plan of all costs charges and expenses” in maintaining and keeping in good repair the aforesaid roads, sewers, promenade and sea wall “for the common use convenience and advantage of the “owners for the time being of the several plots of land described in “the same plan and of the dwelling-houses erected or to be erected “thereon . . . and that . . . [if] any of the said persons parties “hereto of the first part or his or their respective heirs or assigns “or owner or owners for the time being of plots inscribed on the “said plan . . . or of the dwelling-house or dwelling-houses thereon “erected who shall refuse or neglect to pay such proportionate share “of such costs charges and expenses the said” O. and J. “or the “survivor of them or his heirs executors administrators or assigns “or other the trustee or trustees for the time being under these “presents” should have a right to distrain “in the same manner “as landlords are authorized to do for rent in arrear. . . .”

In 1931 F. purchased for an estate in fee simple a plot and dwelling-house built thereon, situate in Cressington Park, and the premises were conveyed to him subject to the covenants contained in the deed of 1851 so far as “they related to and affected the said “house and land and were subsisting and enforceable and capable “of taking effect.” Subsequently F. let the house to five separate tenants and it was at the present time so let.

Until 1950 it was the practice at the annual general meeting of proprietors to levy an equal sum per plot upon the owners to defray the cost of maintaining the roads, sewers, promenade and sea wall, and F., and subsequently his executors, had paid such calls. But in that year and in ensuing years a resolution was passed empowering the trustees to make additional calls in respect of any plot the

dwelling-house on which had been divided into two or more separate flats or dwellings. Pursuant to this resolution additional calls were made on the defendants, F.'s executors, who had declined to pay them.

On the questions whether (a) in so far as the deed of 1851 purported to make the successors of the original contracting parties liable to pay calls, was it valid and effectual at all; (b) if so, was the resolution of 1950 imposing additional calls a valid resolution:—

Held, (1) that *prima facie* the covenants contained in the deed were unenforceable in that (a) a positive covenant in the terms of the seventh covenant did not run with the land; (b) the particular provisions in respect of payment of calls plainly infringed the rule against perpetuities; (c) the provision for distraining on failure to pay such calls was invalid, since a right to distrain could only be annexed to a rent-charge, which this provision plainly was not; but that

(2) the defendants, who could not rely on prescription or a way of necessity, were not entitled to take advantage (as they desired) of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder, viz., the payment of calls, and that on that principle they were bound by its terms.

Observation of Lord Cozens-Hardy M.R. on Co.Litt. 230b in *Elliston v. Reacher* [1908] 2 Ch. 665, 669 applied.

(3) That on the true construction of the deed the resolution imposing additional calls in the manner therein specified was *ultra vires* and void, in that the deed contemplated payments in "a due and just proportion" relative to the plot or plots as such, and not to the user of the plots.

Liverpool District Registry.

ADJOURNED SUMMONS.

By a conveyance dated May 3, 1851, certain fields or closes of land containing in the whole 40 acres or thereabouts situate at Garston in the county of Lancaster were conveyed to one William Okell and one Alexander Colquhoun Jeffrey in consideration of the sum of £24,685 5s. for an estate in fee simple free from incumbrances. This land, the subject of the conveyance of May 3, 1851, was subsequently sold off by Okell and Jeffrey in 174 building plots, and later became known as Cressington Park, Liverpool. On the occasion of each conveyance on sale the purchasers entered into a number of covenants and those covenants were repeated in a deed of covenant dated August 19, 1851.

By that deed, which was made between the several owners of plots of the one part and the said William Okell and Alexander

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Colquhoun Jeffrey of the other part, after reciting the conveyance of May 3, 1851, and reciting that the said 40 acres of land had been purchased by the said Okell and Jeffrey for the purpose of laying out and dividing the same into the several plots or allotments and forming the roads, sea wall and promenade described in the plan drawn upon the said indenture with a view to the erection of a dwelling-house on each of the said plots of land and as trustees for the several and respective persons parties thereto, to each of whom the several and respective plot or plots of land in the said plan with his respective name had been severally conveyed, the indenture proceeded as follows: " And whereas in " the conveyance of each and every of the said plots of land to " the said persons parties thereto are contained on the part of " the grantees therein respectively named and their respective " heirs executors administrators and assigns covenants similar " in terms or in effect to the covenants hereinafter contained. . . . " And whereas the site of the roads and of the sea wall and " promenade described in the said plan and therein for distinction coloured yellow and also the lodge are intended to be left " vested in the said William Okell and Alexander Colquhoun " Jeffrey their heirs and assigns by virtue of the said conveyance " of the third day of May One thousand eight hundred and fifty " one Upon trust to permit and suffer the same at all times for " ever to be freely used and enjoyed by the said persons parties " hereto and their respective heirs and assigns and by the " occupiers for the time of the said several plots of land inscribed " in the said plan with the names of the said persons parties " hereto and of the several dwellinghouses erected or to be " erected thereon respectively and as to such plot or plots of land " as shall not be allotted to or taken by any of the said persons " parties hereto Upon the trusts hereinafter declared And " whereas for better securing the performance of the covenants " contained in the several and respective conveyances of the said " several and respective plots of land described in the said plan " on the part of the several and respective grantees therein " respectively named and their respective heirs executors " administrators and assigns it was agreed that each of the " several and respective grantees on delivery to him her or them " of his her or their respective conveyance and before parting " with or conveying away the plot or plots thereby conveyed or " any part thereof should execute these presents Now this Indenture witnesseth that in pursuance of the said hereinbefore

“ recited agreement each of them the said persons parties hereto
 “ of the first part but so far only as related to the several and
 “ respective plots or plot of land in the said plan inscribed with
 “ his own respective name and so far as relates to the acts and
 “ deeds of himself respectively and his respective heirs executors
 “ administrators and assigns in relation to the same several and
 “ respective plot or plots of land but not further doth hereby for
 “ himself his heirs executors administrators and assigns covenant
 “ with the said William Okell and Alexander Colquhoun Jeffrey
 “ their heirs and assigns and each of them the said William
 “ Okell and Alexander Colquhoun Jeffrey but so far only as
 “ relates to the several and respective plot or plots of land in the
 “ said plan marked with his own respective name and so far as
 “ relates to the acts and deeds of himself respectively and his
 “ respective heirs executors administrators and assigns in relation
 “ to the same several and respective plot or plots of land but not
 “ further doth hereby for himself his heirs executors adminis-
 “ trators and assigns covenant with the other of them the said
 “ William Okell and Alexander Colquhoun Jeffrey and his respec-
 “ tive heirs and assigns and also as a separate covenant with
 “ each of the said persons parties hereto of the first part and his
 “ respective heirs executors administrators and assigns in manner
 “ hereinafter mentioned.”

Then followed a number of restrictive covenants. But the seventh covenant was in these terms: “ Seventhly: That each
 “ and every of them the said persons parties to these presents
 “ and his respective heirs executors administrators and assigns
 “ shall and will from time to time contribute and pay a due and
 “ just proportion in respect of the plot or several plots of land in
 “ the said plan marked with his name respectively and of the
 “ dwellinghouse on each such plot erected or to be erected in
 “ common with the owners of the several other plots of land
 “ described in the said plan of all costs charges and expenses
 “ which have been already incurred and which shall from time
 “ to time and at all times hereafter be incurred in or about the
 “ forming and constructing and the maintaining and keeping in
 “ good repair and cleansing and scouring as well of the several
 “ roads or ways described in the said plan and of the sea wall
 “ promenade and lodge as also all and every the main drains
 “ and main sewers already made or hereafter to be made in or
 “ upon any part or parts of the land described in the said plan
 “ for the common use convenience and advantage of the owners

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“ for the time being of the said several plots of land described
“ in the same plan and of the dwellinghouses erected or to be
“ erected thereon respectively or for the general and common
“ drainage of the same lands and that the expense of lighting
“ the said roads or ways with gas shall be contributed and paid
“ by the owners of such dwellinghouses as for the time being
“ shall be erected on the said plots of land and as shall be com-
“ pleted and fit for habitation in equal shares and proportions and
“ that for such respective proportionate share of all such costs
“ charges and expenses as aforesaid of any of the said persons
“ parties hereto of the first part or his or their respective heirs
“ or assigns or the owner or owners for the time being of any of
“ the said plots of land inscribed on the said plan with the name
“ or names of any of the said persons parties hereto of the first
“ part or of the dwellinghouse or dwellinghouses thereon erected
“ who shall refuse or neglect to pay such proportionate share of
“ such costs charges and expenses the said William Okell and
“ Alexander Colquhoun Jeffrey or the survivor of them or his
“ heirs executors administrators or assigns or other the trustees
“ or trustee for the time being under these presents shall when
“ and so often as such refusal or neglect shall happen have full
“ power to distrain upon and shall and may distrain upon the
“ plot of land messuage or dwellinghouse or several and respec-
“ tive owners whereof respectively shall have made such neglect
“ or refusal in the same manner as landlords are authorized to
“ do for rent in arrears. . . . And lastly: That the several and
“ respective persons parties to these presents respectively and
“ their respective heirs and assigns and the respective owners
“ for the time being of the said several and respective plots of
“ land inscribed on the said plan with the names of the said
“ persons parties to these presents respectively and of the
“ several and respective dwellinghouses erected or to be erected
“ thereon respectively shall and will from time to time and at
“ all times hereafter abide by submit to and observe all such
“ lawful and reasonable rules and regulations as shall from time
“ to time be made by or on the part of the owners for the time
“ being of the same several plots of land at any meeting to be
“ held as hereafter mentioned for or in relation to the promoting
“ of the better and more convenient and advantageous enjoy-
“ ment of the whole of the same plots of land and the dwelling-
“ houses thereon or for or in relation to the contribution by the
“ owner or owners for the time being of each of the same plots

“ of land of the means necessary towards the expenses of keeping
 “ in repair the said roads sea wall promenade and lodge and
 “ main drains and sewers and of lighting the said roads with
 “ gas.”

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There followed a covenant by Okell and Jeffrey to keep the roads “ Upon trust to permit and suffer the same at all times
 “ for ever hereafter to be left open and unbuilt upon and to be
 “ freely used and enjoyed by the said several and respective
 “ persons parties to these presents and by their several and
 “ respective heirs and assigns and by the owners and occupiers
 “ for the time being of the said several and respective plots of
 “ land numbered from 1 to 174 inclusively upon the said plan
 “ and of the several and respective dwellinghouses erected and
 “ to be erected thereon respectively.”

After the covenant that the roads and promenade should remain for ever left open and unbuilt upon, there followed this clause: “ And for the purpose of agreeing and determining upon
 “ the expenses to be from time to time incurred in keeping the said
 “ roads promenade sea wall lodge and sewers in repair and for
 “ lighting the said roads with gas and also for making and deter-
 “ mining upon the rules and regulations to be observed for the
 “ better more convenient and more advantageous enjoyment of
 “ the said several plots of land and the dwellinghouses erected
 “ and to be erected thereon and for securing all other objects of
 “ these presents. It is hereby agreed and declared between and
 “ by the said persons parties to these presents as follows ”; that
 is to say, there was to be a general meeting of the proprietors
 once in every year to be held on the first Monday in July. Then
 there were provisions for calling an extraordinary meeting and
 provisions for giving seven days’ notice of the meeting and pro-
 visions for a quorum and the election of a chairman. The
 provision as to the voting was this: “ The owner of one plot one
 “ vote, the owner of two and under six plots two votes, the owner
 “ of six plots and under ten plots three votes and owner of ten
 “ plots and upwards four votes.” Then there were provisions as
 to joint tenancy.

There followed this: “ the determination or resolution of
 “ every such meeting shall be binding on all the said persons
 “ parties to these presents and their respective heirs and assigns
 “ but that no expenses for repairs or otherwise shall be incurred
 “ except such as shall be sanctioned by some general or extra-
 “ ordinary meeting unless any accident should occur as the

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“bursting of a sewer or any destruction by storm or otherwise
“of the sea wall requiring immediate repair That no rule
“regulation resolution or determination of any meeting shall be
“annulled or altered but by the determination of two successive
“subsequent general meetings.” Then there followed in these
terms a provision with regard to plots of land not taken up: “It
“is hereby further agreed and declared between and by the
“said persons parties to these presents that the said William
“Okell and Alexander Colquhoun Jeffrey their heirs and
“assigns shall stand seised of and interested in the said plot or
“plots of the said land which shall not be allotted to or taken
“by any of the said persons parties hereto and also the said
“lodge Upon trust to let the same for the benefit of the share-
“holders for the time being according to their respective shares
“thereof but subject to the control of any meeting of the share-
“holders as aforesaid.” Then there followed a trust that the
trustees might sell these unallotted plots from time to time and
that clause concluded with these words: “if there be any surplus
“then do and shall pay the same between and to the said
“persons parties to these presents according to their respective
“shares thereof.”

In 1928, in proceedings in the Court of Chancery of the
County Palatine of Lancaster, it was declared that the restrictive
covenants did not prevent the owner for the time being of any
house erected in the park from dividing it into two or more flats.
Pursuant to that declaration a number of the houses in the park
had in recent years been so divided.

The defendants were the executors of the will of John Finney,
deceased, who was the owner in fee simple of the house and land
numbered 22 in Salisbury Road. That plot and the house
thereon were conveyed to him by a conveyance dated August 31,
1931, and they were conveyed to him subject to the covenants
contained in the deed of covenant, so far as “they related to and
“affected the said house and land and were subsisting and
“enforceable and capable of taking effect.” By way of
indemnity, the purchaser covenanted with his vendor to perform
and observe the covenants so far as they were enforceable.
During his lifetime Finney caused his house to be let to
five separate tenants, but he made no structural division of it,
and the house was now occupied by and let to five separate
tenants.

The plaintiffs were the present trustees of the deed of covenant of August 19, 1851. The lodge and the sites of the roads, promenade and the sea wall therein referred to were vested in the plaintiffs for an estate in fee simple upon the trusts of the deed. The plaintiffs had acted in accordance with the trusts of the deed as trustees thereof and had maintained the lodge and roads and promenade and otherwise acted for the benefit of the owners of the houses in the park as required by the terms of the deed.

Since the execution of the deed of covenant of August 19, 1851, it had been the practice of the trustees thereof for the time being to convene and hold as thereby provided a general meeting of the owners of plots of land included in the park. At every such meeting it had been resolved, *inter alia*, that during the next ensuing year there should be levied upon the respective owners of plots of land a sum of money which was to be paid to and applied by the trustees in or towards the cost of maintaining the lodge, roads, promenade, sea wall, drains and sewers and otherwise in accordance with the provision of the deed.

Until the year 1950 it was the practice of the persons present at every such annual general meeting to resolve that an equal sum should be paid in respect of each plot.

At the annual general meeting duly convened and held on September 4, 1950, it was resolved, *inter alia*: "That during the year 1950/51 and every ensuing year the trustees shall be empowered to make an additional call in respect of every plot, the dwellinghouse upon which shall have been divided into two or more separate flats or dwellings, and that the amount of the call in respect of any such plot shall be the amount of the call for the current year multiplied by the number of the separate flats or dwellings into which such dwellinghouse shall have been divided, provided that :—(a) For the purpose of this resolution if the dwellinghouse stands upon parts of two or more separate plots it shall be deemed to be erected on only one plot and (b) No more than three calls should be paid in respect of any plot on which one such divided dwellinghouse stands."

At the annual general meeting convened and held on September 18, 1956, a resolution in identical words was passed.

In the year 1951–1952 the sum levied in respect of a single plot was £2 10s. and in each of the years 1952–1953, 1953–1954

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and 1954-1955 the sum so levied in respect of a single plot was £3. The plaintiffs in the years 1951-1952 required the defendants to pay the sum of £7 10s. and in each of the years 1952-1953, 1953-1954 and 1954-1955 to pay the sum of £9. The defendants paid the sum of £2 10s. in respect of the year 1951-1952 and the sum of £3 in respect of each of the ensuing years, but refused to pay the additional sum of £5 in respect of the year 1951-1952 or the additional sum of £6 in respect of each of the ensuing years.

The plaintiffs, the present trustees of the deed of covenant and respectively the owners of other dwelling-houses and land subject to the deed issued the present summons for the determination of the following question: whether on the true construction of the deed of covenant of August 19, 1851, and in the events which had happened the plaintiffs, as trustees of the said deed, were entitled to require the defendants as owners in fee simple of a house and land situate within the park to pay to the plaintiffs the sum of £5 in respect of the financial year ending on June 30, 1952, and the sum of £6 in respect of each of the ensuing financial years by way of additional contribution towards the cost of the maintenance by the plaintiffs as such trustees as aforesaid of the roadways, drains and sewers, lodge, promenade and sea wall, respectively, mentioned in the same deed of covenant.

W. L. Blease for the plaintiffs. The plaintiffs, the present trustees of the deed of covenant, are anxious to have determined the questions (a) whether, in so far as it purported to make the successors of the original contractual parties liable to pay calls, the deed is valid and effectual at all; (b) if so, was the resolution of 1950 imposing additional calls a valid resolution.

As to the first question, it is submitted that the obligations imposed on the owners of plots by the deed of covenant are enforceable. Either the easements or rights provided for all the plottolders are benefits shared by all of them on condition that all of them share also the burdens; or the roads and sewers are maintained by the plaintiffs as trustees for the plottolders, and as such trustees the plaintiffs can claim to be reimbursed their expenses by their beneficiaries. Alternatively, putting the argument in a common law form: by providing the roads and sewers the trustees make a standing offer to all who purchase plots in the park that they will maintain the works in consideration of the annual payment by each plottolder, and this offer is accepted by

the plotholder by his conduct in taking possession of his plot and using the works.

As to the second question, it is to be observed that the seventh covenant provides that the parties to the deed and their respective successors in title shall from time to time contribute and pay “*a due and just proportion*,” in respect of the plot or plots and the dwelling-house to be erected thereon, of all costs, charges and expenses of, inter alia, maintaining and keeping in good repair the roads, main drains and sewers and sea wall, whilst the expense of lighting the roads by gas was to be contributed and paid by the owners of dwelling-houses “*in equal shares and proportions*.” This is a curious distinction, and shows that whilst the cost of lighting was to be borne equally, that is, as between plots, the cost of maintenance of the roads and sewers and other amenities was to be borne in “*just proportions*,” and thus there was given a right to discriminate in the latter case as between the several owners of plots according to the size of their respective dwelling-houses. The resolution of 1950 discriminates in the case of houses divided into two or more dwellings. Such discrimination is within the ambit of the terms of the seventh covenant, for houses thus divided throw an extra burden on the roads and sewers by reason of increased user.

C. A. Settle for the defendants. The covenant relating to the payment of calls is not enforceable. It is a positive covenant and the burden of a positive covenant does not run with the land so as to bind the successors in title of the original plotholders. It has been contended, in effect, that the rights created by the deed of covenant are in the nature of conditional easements, as to which see *Gale on Easements*, 12th ed., p. 432. On the true construction of this deed, however, there is no grant of a conditional easement but merely a declaration of trust “for better securing the performance of the covenants contained in the several and respective conveyances of the . . . several and respective plots of land” in question. Further, the provision in the deed which gives the trustees a right to distrain in respect of non-payment of calls is invalid, since such a right can only be annexed to a rent-charge. A valid right of distress cannot be conferred in respect of the non-fulfilment of a condition. The question at issue in the present case was canvassed in argument in *Duncan v. Louch*,¹ but it was not there decided.

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¹ (1845) 6 Q.B. 904, 912, 913.

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[UPJOHN J. Is there not a rule that a person who accepts the benefit of a deed must also accept the burden of it?]

Yes, that is conceded: see Norton on Deeds, 2nd ed., p. 26, and the observation of Lord Cozens-Hardy M.R. on Co. Litt. 230b, in *Elliston v. Reacher*.²

As to the second question, it is plain from the deed as a whole that for the purposes of assessment the plot is the unit of reference. Accordingly, since the resolution of 1950 is concerned with the *user* to which a proprietor puts his plot, it is *ultra vires* the deed and void. [Reference was also made to *In re Ellenborough Park*.³]

Blease replied.

UPJOHN J. This summons raises two points on the construction of a building scheme entered into as long ago as August 19, 1851, by a large number of owners of properties in what is now known as Cressington Park which is now within the City of Liverpool. I shall have to review a number of its provisions in some detail, but it may be convenient at the outset to indicate the general nature of the scheme, which was this. On May 3, 1851, about 40 acres of land, which afterwards became Cressington Park, were purchased for the sum of some £24,000. That piece of land was sold off in some 174 plots. Some purchasers purchased more than one plot. On the occasion of each conveyance on sale the purchasers entered into a number of what I may call building covenants, and those covenants were repeated in the deed of August 19, 1851, which I have to construe.

The principal object of the deed was this. The plots had been sold off, but there remained vested in the original purchasers, Okell and Jeffrey, the roads and a promenade along a sea wall. The object of the deed was to declare trusts concerning the roads and the promenade for the benefit of the purchasers and to provide for payment of the necessary expenses proportionately by the owners in respect of the upkeep and maintenance of the roads and promenade, and also of the sewers, which had been placed under the road, and of the street lighting which was, of course, by gas. To this day the sewers have not been taken over by the local authority, nor have the roads serving the park, all of which remain in the plaintiffs, who are the successors of the original trustees, Okell and Jeffrey. With regard to

² [1908] 2 Ch. 665, 669.

³ [1956] Ch. 131.

the street lighting, that has been taken over by the local authority and no question arises. The deed contained elaborate provisions for the owners of the plots to meet and to decide what was an appropriate sum to be paid annually to defray the necessary expenses of the trustees in the upkeep of the roads, the promenade, the sewers and the lighting. There were also a number of restrictive covenants in it, that is to say, certain building lines had to be conformed to, there were restrictions against building more than one dwelling-house on each plot, and so on. But with those covenants I am not directly concerned.

With those general remarks I can now turn to the consideration of the deed. The parties to it were a large number of owners of plots of the one part and Okell and Jeffrey of the other part. [His Lordship referred to the relevant parts of the deed and observed that it was on the seventh covenant therein that the principal question to be determined arose, and continued:] In 1928, in proceedings in the Court of Chancery of the County Palatine of Lancaster begun by originating motion, it was declared that the restrictive covenants did not prevent the owner for the time being of any house erected in the park from dividing the same into two or more flats. Pursuant to that declaration a number of dwelling-houses have been so divided. The defendants are the executors of one John Finney deceased, who was the owner of an estate in fee simple of No. 22, Salisbury Road, that being one of the plots of land. That plot and the house thereon were conveyed to him by a conveyance dated August 31, 1931, and they were conveyed to him subject to the covenants contained in the deed of 1851, so far as "they related "to and affected the said house and land and were subsisting "and enforceable and capable of taking effect." By way of indemnity, Finney covenanted with his vendor to perform and observe the covenants so far as they were enforceable. During his lifetime Finney caused his house to be let to several tenants, but he made no structural division of it, and at the present time the property is occupied and let to five separate tenants. ✓

The practice, as I understand it, until 1950 was this. Each year there was this general meeting of proprietors or shareholders, as they were sometimes described in the deed, and they made a levy of an equal sum per plot upon the owners. But in 1950 a resolution was passed to this effect: [His Lordship read it and continued:] Pursuant to that resolution, certain calls

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were made upon the defendants. I need not enumerate them. But, by way of example, I may take the call for 1954-1955, which in respect of a single plot was £3. As the defendants had five flats, bearing in mind the terms of the resolution that no more than three calls were to be made in respect of any one plot, they have been assessed in respect of 1954-1955 in the sum of £9. The defendants have been willing to pay £3 in respect of the one plot, but deny the validity of the resolution purporting to make them liable to pay three calls in respect of one plot. That is the question I have to determine.

♦ That gives rise to two questions. First, in so far as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls, is it valid and enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons. First, a positive covenant in the terms of the seventh covenant does not run with the land. Secondly, these particular provisions with regard to the payment of calls plainly infringed the rule against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provision for distraining on failure to pay is not valid. A right to distrain can only be annexed to a rent-charge, which this certainly is not. But it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need but refer to one sentence during the argument in *Elliston v. Reacher*,¹ where Lord Cozens-Hardy M.R. observed: "It is laid down in Co. Litt. 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it." If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do desire to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity or on any right by prescription, for the simple reason that when the house was originally sold in 1931 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually

¹ [1908] 2 Ch. 665, 669.

bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits. ✓

The second question is this: upon the true construction of the deed was the resolution which I have read and which was passed in September, 1950, a valid resolution? That depends primarily on the covenant, which I have read, described as the seventh. I do not propose to read it again. By that covenant each of the plot owners covenanted to “contribute and pay a due” and just proportion in respect of the plot or several plots of “land . . . and of the dwelling-house on each such plot.” That was in regard to the costs and charges of keeping the roads in repair and of repairing the sea wall, promenade and lodge, and maintaining the sewers. With regard to the expense of lighting, it is to be observed that the covenant is rather different because the expense of lighting the roads with gas is to be contributed to and paid by the owners of such dwelling-houses as are, for the time being, erected and completed and fit for habitation, in equal shares. The owners or shareholders have power to make rules and regulations for the proper administration of the estate, and in particular for the purpose of agreeing and determining upon the expenses to be from time to time incurred.

The question really, I think, comes to this: was this resolution a resolution which could properly be made by the proprietors or shareholders? In my judgment, it can only be properly made if the method proposed was a proper method whereby each owner of a plot was bound to contribute “a due and just proportion.” If the resolution proposed did not result in payment of what upon the true construction of the deed was a due and just proportion then, in my judgment, it would not be a valid resolution.

Upon that the argument was very short. It was said that, on looking at the deed as a whole, one found that the whole of the deed was made to depend upon the idea of owners of plots, that the plot was the unit for the purposes of the deed, and that,

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therefore, any contribution ought to be assessed upon a basic plot. It might be that one might assess it, it was said, by reference to the rateable or annual value of each plot, but, nevertheless, it must be by reference to a plot and not by reference to some user. Thus, it was contended that one could not possibly make a proprietor contribute, for instance, to the upkeep of a road by reference to the number of motor-cars that he used or by reference to the number of his family or servants that were resident in the house. So, it was said, one could not make a contribution depend upon the user to which any particular proprietor puts his plot. If he likes lawfully under the declaration of 1928 to divide up his house into a number of tenancies, he cannot be assessed, on the words of "a due and "just proportion," by reference to that user any more than by reference to the number of his children or servants or motor-cars. I accept that argument. It seems to me that the whole of this document was concerned with the management of the roads, and other amenities for the benefit of the owners of the plots as such, and I think that when the document refers to the contributor paying a due and just proportion in respect of the plot or several plots and the dwelling-house thereon, the parties were contemplating that there would be an assessment upon each plot. As I have said, it might be an assessment according to the value of the plot. I am not concerned with that, but it is not an assessment merely in respect of the user to which the plot may be put.

Accordingly, in my judgment, the resolution, which, of course, was passed bona fide, was not a proper resolution but was ultra vires and void, for I do not think that the deed empowered the meeting of the proprietors to exercise their discretion in that way and I must make a declaration accordingly.

Declaration accordingly.

Solicitors: *William Rudd, Freeman & Getley, Liverpool;*
Cunliffe & Airy for G. H. Hindley & Co., Liverpool.

J. A. G.

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[1954 H. 2387.]

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June 27,
28, 29;
July 2, 30.

Upjohn J.

Conflict of Laws—Sovereign immunity—Foreign State not a party to proceedings—Impleading foreign sovereign—Money belonging to one sovereign transferred to defendant servant of another foreign sovereign—Transfer by person entitled to operate bank account—No authority to transfer—Action to recover money—Claim that foreign sovereign impleaded or property of foreign sovereign affected—Scope of doctrine of immunity—Application to debt.

C. A.

1956
Nov. 19, 20,
21, 22, 23;
Dec. 20.

Agency—Accountability of agent to principal—Money paid to agent under mistake or wrongfully. Trust—Sole beneficiary—Direction by. Evidence—Fresh evidence—Court of Appeal—Interlocutory matter—Affidavit evidence—Discretion of court.

Lord
Evershed M.R.,
Birkett and
Romer L.JJ.

Money standing to the account of the Nizam of Hyderabad and his Government at the Westminster Bank Ltd. was in September, 1948, when India was said to be invading Hyderabad, transferred by M. (one of the persons entitled to operate the account) into the name of R., then High Commissioner for Pakistan in the United Kingdom, who received the money in that capacity and on the instructions of the Foreign Minister of Pakistan. The Nizam and his Government brought an action against M., R. and the Westminster Bank, claiming the money as money had and received to the use of the plaintiffs; there was also a claim against M. that he had transferred the money in breach of duty.

R., by this motion, asked that the writ in the action and the concurrent writ of summons giving leave to serve out of the jurisdiction be set aside as against R., and that the proceedings be stayed as against the Westminster Bank on the ground that the action impleaded a foreign sovereign, namely, Pakistan, or sought to interfere with the right or interest of the Government of Pakistan in that money. It was conceded that R. had not established any equitable title to the money, and the claim to immunity was based on the fact that the legal title to the debt was vested in R. as High Commissioner for Pakistan. For the Nizam it was contended, *inter alia*, that R. held the debt as trustee for the Nizam:—

Upjohn J. held, (1) that it was not established that M. had acted in breach of trust or duty in transferring the money to R.

(2) That in the consideration of what constituted a sufficient interest in property to establish a claim to immunity, possession and control were relevant in the case of a chattel, but in relation to a pure debt unsupported by pledge or security the question depended on title alone.

(3) That R. could not be regarded as a third party holding as trustee for the true owner (i.e., the Nizam) since the debt was

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vested in him as an official of his Government, and the matter had to be treated as though the debt were that of the foreign sovereign.

(4) That the plaintiffs could not go behind the legal title and show that the equitable title was in them; so that the fact that the legal title was in the servant of the sovereign was sufficient to support its claim to immunity, even though it could claim no equitable title and the claim made by it would appear to involve a wrong.

(5) That the writs should accordingly be set aside as against R., and proceedings stayed as against the bank.

The Nizam appealed. On his appeal an affidavit of the Nizam was filed showing that the fund had been transferred to R. without the Nizam's authority:—

Held by the Court of Appeal, (1) that, as this was an interlocutory matter, leave should be given for that affidavit to be read.

(2) That the applicability of the doctrine of sovereign immunity depended on the extent to which the prosecution of a claim so affected the right or interest of the sovereign as to amount in one way or another to a suit against the sovereign.

(3) That, on the evidence, the money was not transferred to R. as one of the principal officers of the State of Pakistan or so as to identify its holder with the State itself or make the vesting equivalent for all purposes to a vesting in the State; the transfer was a wrongful act on the part of M., the Nizam's agent, or, if the agent thought at the time of transfer that he was acting within his authority, it had been shown that he had acted under a mistake.

(4) That R. not having accounted to Pakistan before he was informed in a letter of May 17, 1954, by the Nizam's solicitors that the fund belonged to the Nizam personally and had been paid to him without the Nizam's authority, the State of Pakistan could not claim to have "control" over the fund as against the Nizam in the absence of any claim on their part to a beneficial title; and that, accordingly, R. stood as third party wholly distinct from the Government or State of Pakistan. The case was not governed by the principle that one holding money as agent for another was accountable only to him; it fell within the exception where, before the agent had in fact accounted to his principal or otherwise altered his position to the same effect, it appeared that the payment was made to the agent under a mistake of fact or in consequence of some wrongful act. Accordingly, the defendants were not entitled to rely on the doctrine of sovereign immunity.

Buller v. Harrison (1777) 2 Cowp. 565 and *Ex parte Bird* (1851) 4 De G. & Sm. 273 applied.

United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572 distinguished.

Semble that if the legal title to property was vested in a sovereign State as bare trustees, the English courts would not exercise their equitable jurisdiction to administer trust property if the sovereign was unwilling to submit to the jurisdiction.

Duke of Brunswick v. King of Hanover (1844) 6 Beav. 1 considered.

Per Romer L.J. The transfer of the fund by M. to R. gave rise to a resulting trust solely in favour of the plaintiffs. R. was accordingly bound as trustee, so long as the fund remained in his control and he had received no contrary instructions from his principals, to comply with the direction of the letter of May 17, 1954. That obligation overrode and superseded any duty arising from his agency to obey directions given to him subsequently by his principals, for his agency had become subordinated to his trusteeship.

Decision of Upjohn J. reversed.

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By this motion the court was asked to set aside the writ issued in this action on July 8, 1954, and the concurrent writ issued pursuant to the order of Wynn-Parry J. on January 11, 1955, giving leave to serve out of the jurisdiction, as against the third defendant, Habib Ibrahim Rahimtoola (hereafter referred to as "Rahimtoola"), and to stay all proceedings as against the second defendant, Westminster Bank Ltd., on the ground that the action impleaded the Government of Pakistan or, alternatively, sought to interfere with the right or interest of such Government to or in the sum of £1,007,940 9s. 1d., standing to the credit of Rahimtoola with the Westminster Bank Ltd., hereafter referred to as "the debt." Alternatively, the motion sought to discharge the order of Wynn-Parry J. giving leave to issue and serve the concurrent writ of summons on Rahimtoola on the ground that the affidavit in support thereof did not disclose the relevant facts known to the plaintiffs at the time of such application.

The action in question was by the Nizam of Hyderabad and his Government claiming as against the three defendants payment of the debt, and the circumstances in which the claim was made were as follows: In September, 1948, there was standing to the credit of the Government of the Nizam of Hyderabad with the Westminster Bank Ltd. this debt, which represented part of larger sums formerly standing to the credit of two accounts in the name of the Nizam or his Government which were earmarked for the purchase of machinery. Two persons only had power to operate the account, namely, either the first defendant, Nawab Moin Nawaz Jung (hereafter referred to as "Moin"), then Finance Minister of the Nizam's Government, or the Agent-General for Hyderabad in London, Mir Jung (hereafter referred to as "Mir"). At this time the forces of the Indian Government were invading the State of Hyderabad, and four or five days before September 20, 1948, Moin or Mir called on Rahimtoola,

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then High Commissioner for Pakistan in the United Kingdom, at his official residence in Hampstead, and there was an interview at which Moin (or Mir), Rahimtoola himself and Sir Zafrullah Khan, then Foreign Minister of Pakistan, were present.

Rahimtoola gave a detailed account on affidavit of the interview, which had not been disputed. He said that the representative of the Nizam came to ask him to accept a transfer into his name of the funds standing to the credit of the Nizam's Government with the Westminster Bank Ltd. Sir Zafrullah Khan instructed him to accept the transfer. Rahimtoola objected on the ground that the Government of Pakistan should not become involved, but his objection was overruled by Sir Zafrullah, who directed him to agree to a transfer to an account in his name but to be described as the High Commissioner for Pakistan. Sir Zafrullah also directed Rahimtoola to sign the necessary specimen signature forms; which he did. Rahimtoola stated that he would never have agreed to the transfer unless he had been expressly instructed to do so as High Commissioner for Pakistan and on behalf of his Government by Sir Zafrullah, under whose instructions as High Commissioner he was bound to act. It was never suggested to Rahimtoola that he was to accept the funds on his own account as a private individual as agent or trustee for the Nizam, and, had it been so suggested, he would have refused to do so, as he would have considered it improper so to act while holding the position of High Commissioner. He did not know whether the moneys so transferred to him were personal moneys of the Nizam or State moneys, and whether Moin or Mir had been given any instructions upon the matter. He further said that he would have refused to deal with this debt except in accordance with the instructions of his Government.

Moin appeared to have been temporarily in London at this time, and on September 16, 1948, he gave written instructions to the Westminster Bank Ltd. to close the account of the Nizam's Government "by transfer of the balance to the credit of Mr. Habib Ibrahim Rahimtoola, High Commissioner for Pakistan in London whose specimen signatures are enclosed herewith." The bank received this letter by hand on September 20, and immediately carried out its instructions, and so informed Rahimtoola on the same day. Two days later a series of cables started to arrive from Hyderabad asking the bank to arrange that no withdrawals were permitted from the Nizam's account until further instructions were received from the Nizam,

and to arrange for a retransfer of the debt. Some of these cables were routed through the Government of India, but it was too late. The title of the account in the books of the bank to which the transfer was made was "Habib Ibrahim Rahimtoola, "High Commissioner for Pakistan in London."

In 1950 the Westminster Bank Ltd. became aware that the Government of India was laying claim to the debt. On July 8, 1953, Rahimtoola (who had some 17 months previously ceased to hold the office of High Commissioner for Pakistan in the United Kingdom and was then Ambassador to France), acting upon the instructions of his Government, instructed the Westminster Bank Ltd. to transfer the debt, together with all interest accrued thereon, into the name of Mr. Ispahani, the then High Commissioner for Pakistan in the United Kingdom. The bank refused to do so, referring to the fact that shortly after the transfer, the Nizam's Government had purported to object to the transfer and also to the fact that the Government of India laid claim to the debt. Lengthy correspondence ensued, during the course of which the Westminster Bank Ltd. suggested interpleader proceedings; but the Government of Pakistan were not prepared to waive their immunity, and the suggestion was dropped. Finally, the writ in this action was issued.

A statement of claim was delivered on November 5, 1954, in which the plaintiffs claimed payment of the debt on three grounds: (a) as money held in trust for the plaintiffs; (b) as money due and owing to the plaintiffs; or (c) as money had and received to the use of the plaintiffs. The plaintiffs also claimed the debt as against the defendant Moin as money paid away in breach of trust.

B. J. M. MacKenna Q.C. and *Oliver Smith* for third defendant, Rahimtoola. The evidence of Rahimtoola shows that he acted as agent of the Government of Pakistan and that he accepted the transfer of the money on their behalf. The Government of Pakistan now claim the money, the legal title to which is held by their agent on their behalf, and they have refused to submit to the jurisdiction of the court. This action seeks to interfere with the property of the Government of Pakistan, and to use the process of these courts to establish the plaintiffs' claim would be to infringe the immunity from process to which the Government of Pakistan is entitled because of the interest which they have in the money.

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The case for Rahimtoola is based on two grounds: (1) the Government of Pakistan is indirectly impleaded by virtue of the relief sought in the action, and (2) this debt against the Westminster Bank is property of the Government with which it is sought to interfere by the action.

The debt of the government of a foreign sovereign is protected by the doctrine of sovereign immunity: *Duff Development Co. Ltd. v. Kelantan Government*.¹ It is a well-established rule of international law that a foreign sovereign State cannot be directly or indirectly impleaded without its consent. To rely on the doctrine of sovereign immunity the Government must show some right or interest, whether it is called property or not, which is immune from interference by the courts of this country. In the case of chattels some interest less than a proprietary interest is enough, and possession is sufficient to support a claim to immunity: *Compania Naviera Vascongada v. S.S. Cristina*.²

On principle the rule that possession is enough to come within the rule of sovereign immunity should not be limited to chattels, but should include choses in action. The claim to immunity by the Government of Pakistan is based on their possession or control of the debt; when the property is a banking account the operative word is "control." In *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England*³ the doctrine of immunity was applied to the property (gold bars) in the hands of a bailee of the foreign sovereign. There is no English reported case where the court has had to consider a claim to immunity based on a debt with a bank, which was held by an agent of the sovereign; but the District Court of New York allowed a claim to immunity by the Government of the Philippines in respect of the Government's deposit with the bank: *Bradford v. Chase National Bank*.⁴ There the judge said that the touchstone of a successful claim to immunity for any property was that the property is the possession of the sovereign.⁵

The court cannot go into the banking account in London of a sovereign or its agents; to do so would amount to an interference with the property of the foreign sovereign. The doctrine of sovereign immunity would have little meaning were the courts to permit such investigations. The bank itself is protected so long as it holds that which has been given it by a sovereign State,

¹ [1923] 1 Ch. 385; 39 T.L.R. 187.

² [1938] A.C. 485, 508, 517; 54 T.L.R. 512; [1938] 1 All E.R. 719.

³ [1952] A.C. 592; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

⁴ (1938) 24 Fed.Supp. 28.

⁵ Ibid. 36.

but if it were to part with that property the sovereign might have a good claim in conversion against the bank.

A foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to show that its claim is not merely illusory nor founded on a title which is manifestly defective: *Juan Ysmael & Co. v. Indonesian Republic Government*.⁶ The court must be satisfied that competing claims have to be determined in the action in relation to property which is claimed by a foreign government. The plaintiffs' claim to this debt is clearly competing with that of the Government of Pakistan to this debt.

Rahimtoola is the legal owner; he holds it for the Government of Pakistan; there is therefore a prima facie case that the legal title is in the Government of Pakistan. It was held in *The Jupiter*⁷ that possession was enough to establish a claim to immunity whether or not it was rightful possession. That case was approved by Lord Radcliffe in the *Dollfus Mieg* case⁸; see also *The Arantzazu Mendi*.⁹ It does not matter, therefore, that the possession and control of the sovereign was obtained in breach of municipal law. In *Twycross v. Dreyfus*¹⁰ the defendants were agents of the Peruvian Government and could not be sued in the absence of their principals, but as the Peruvian Government could not be sued its agents could not be sued. That case is relied on; the evidence shows that Rahimtoola purported to act as agent for the Government of Pakistan, and it is just as if the account was in the name of that Government. [Reference was made to Dicey's Conflict of Laws, 6th ed., p. 133.] *Haile Selassie v. Cable and Wireless Ltd.*¹¹ is distinguishable because no title or interest was shown by the King of Italy in respect of the moneys in question and the action did not seek to bring him before the court or to interfere with any proved or admitted right belonging to him. Here the agent of the sovereign has proved that he has the legal title, and he need prove no more.

There are a number of trust cases relating to the doctrine of immunity which decide nothing more than that if it is proved in an English court that without violating the immunity of a

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⁶ [1955] A.C. 72, 89; [1954] 3 All E.R. 236. A.C. 256; 55 T.L.R. 454; [1939] 1 All E.R. 719.

⁷ [1924] P. 236; 40 T.L.R. 815.

⁸ [1952] A.C. 617.

⁹ [1939] P. 37; 55 T.L.R. 71; [1938] 4 All E.R. 267, C.A.; [1939]

¹⁰ (1877) 5 Ch.D. 605.

¹¹ [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

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sovereign a trust exists, and that the trustee is subject to the jurisdiction of the court, the court will administer the trust even though a foreign sovereign is a beneficiary of the trust. Those cases do not decide that where property is held in this country by a person purporting to hold it as agent for a foreign sovereign, and his position as agent is accepted and recognized by the foreign sovereign, that if it is claimed in an action that the property is impressed with a trust for the benefit of the claimant, and the foreign sovereign denies the claim and himself claims immunity, that the sovereign's claim to immunity cannot succeed. In such a case the courts will not determine the validity of the claim in the action. [Reference was made to *Duke of Brunswick v. King of Hanover*¹²; *Larivière v. Morgan*¹³; *Gladstone v. Musurus Bey*,¹⁴ and Westlake's Private International Law, 7th ed., p. 272.]

The court has to decide on this motion whether the Government of Pakistan has an interest which entitles them to have the action discontinued, but that does not mean that on the motion the court must see whether there is a trust of the property; that would be deciding an issue in the action. The evidence establishes a competition of rights, something which would have to be determined by the court if both parties were private persons, but not if one is a sovereign who does not wish to submit to the jurisdiction. The agency of Rahimtoola for the Government of Pakistan is established at the outset and it is not affected if there has been any breach of duty by Moin.

The second ground on which a stay is sought is that the plaintiffs failed to make a disclosure of certain relevant facts in the affidavit in support of the application for leave to serve out of the jurisdiction. They did not bring to the notice of the court that the money was transferred to Rahimtoola as agent for the Government of Pakistan, and in the affidavit in support of the application reference was not made to the fact that when this sum of money was transferred to the credit of Rahimtoola he was High Commissioner for Pakistan in the United Kingdom, and that the Government of Pakistan had claimed to be entitled to the money and had informed the Westminster Bank that it was not prepared to waive its sovereign immunity. It is said that the deponent did not appreciate the situation, but that does not affect the position: *The Hagen*.¹⁵ There is a duty on those making ex parte applications to make a full disclosure of all

¹² (1844) 6 Beav. 1.¹⁴ (1862) 1 H. & M. 495.¹³ (1872) L.R. 7 Ch. 550; (1875) L.R. 7 H.L. 423.¹⁵ [1908] P. 189; 24 T.L.R. 411.

known facts and it is no excuse for failure to do so that a judge would have made the same order even if the full facts had been known to him: *Lazard Bros. & Co. v. Midland Bank Ltd.*¹⁶

Sir Andrew Clark Q.C. and *S. B. R. Cooke* for the plaintiffs, the Nizam of Hyderabad and the State of Hyderabad. Until 1950 the Nizam was an absolute monarch and the money originally deposited in the bank to the credit of the Nizam's Government meant nothing more than the Nizam, because Government property and the Nizam's property were indistinguishable. A question may have to be discussed in the action whether after 1950 it is public property, but it is not relevant on the motion.

The defendant Moin was one of two persons who were duly authorized to draw on this account, but only on instructions by the Nizam. By a firman of June 26, 1948, certain amounts in sterling were reserved for the purchase of machinery. This sum was therefore impressed with a trust, i.e., that it should be employed only for the purchase of machinery, and then only when authorized by the Nizam. Both Mir and Moin were accordingly trustees for the Nizam of this trust fund. The bank naturally had no notice of the limitation of Moin's authority to operate the account; all that he had vis-à-vis the bank was a legal chose in action, a right to obtain payment. On September 20, 1948, Moin, without the knowledge or authority of the Nizam, wrongfully and in breach of trust used his legal right to operate the account to transfer the whole sum into the name of Rahimtoola. This act operated to transfer the legal right to Rahimtoola, but it could not confer on him any right to the debt except the bare legal title, and it could not confer on him any beneficial interest. Moin was in effect entrusted with a fund which he was bound to keep separately from his own money.

[UPJOHN J. He was not a trustee; he merely had a right to operate the account.]

He was a trustee of his power to draw on the account, and the moment he drew any money he became a trustee of it. He transferred his right to operate the account to Rahimtoola, who at that date was High Commissioner for Pakistan; that is accepted, but it is not material to this motion and long before the writ was issued he had ceased to be High Commissioner. Rahimtoola took the transfer of the money with the knowledge that it was a debt of the Nizam and the Nizam's Government; he states in his affidavit that he did not know to which it belonged.

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¹⁶ [1933] A.C. 289; 49 T.L.R. 94.

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It follows that Rahimtoola must hold the debt as a bare trustee for the Nizam in whatever capacity he took it. There was a prior trust of this fund which nothing Rahimtoola could do thereafter could ever alter. He says that he was instructed to accept the money by his Government, but if he took as trustee his Government cannot come and claim it; they have no authority over him as trustee. There is no doubt that he had acquired the legal title to the debt, but the beneficial interest remained and still remains in the Nizam. No aspersion is cast on the honour or integrity of Rahimtoola personally, although his title was acquired wrongfully and in breach of trust. Even if he took as agent for the Government of Pakistan (which is not accepted), it could make no difference, as the Government could have no better right than their agent.

The only ground on which it was originally alleged that the Government of Pakistan was impleaded was that Rahimtoola was acting as agent of the Government, who claimed to be entitled to the money. That was a claim to title which was manifestly defective, but a new claim was put forward based on control. Reliance was placed on the American case of *Bradford v. Chase National Bank*,¹⁷ but that case does not really touch the question in the present case, and it was in fact reversed on its facts in the Court of Appeal: *Berger v. Chase National Bank of City of New York*.¹⁸

This claim goes far beyond any case in which the doctrine of immunity has been applied in this country. The House of Lords said in the *Dollfus Mieg* case¹⁹ that the doctrine should not be further extended: see also statement of Lord Maugham in *The Cristina*.²⁰ There has been a certain amount of confusion as to what is meant by indirect impleading; it is a form of Admiralty writ used when there is an action in rem and a party not named is called upon to appear.

It is submitted that Rahimtoola was not acting as agent for the Government of Pakistan; that is a pure question of fact, and if it be right it is an end of the matter. He was, of course, as High Commissioner agent for the Government of Pakistan, but not for the purpose of this transaction. Alternatively, if the court should find that Rahimtoola was the agent for the Government of Pakistan, then the writ in this action does not implead Pakistan either directly or indirectly; this is not a case where an agent

¹⁷ 24 Fed.Supp. 28.¹⁹ [1952] A.C. 582, 607, 622.¹⁸ (1939) 105 Fed.Rep., 2nd series, 1001.²⁰ [1938] A.C. 485, 515-519.

cannot be sued in the absence of his principal like *Twycross v. Dreyfus*.²¹

With regard to possession or control, the question is whether the Government of Pakistan have possession or control of property which would be taken by an order in favour of the plaintiffs, but it is impossible to have control of a chose in action when the legal title is vested in a third party, even though the third party be his agent. *Duff Development Co. Ltd. v. Kelantan Government*²² was a very different case, because the legal and equitable title to the chose in action was vested in the foreign sovereign State, and it has no application where the title is not in the possession of the State. If the Government of Pakistan is forced to rest its case on title, that title is manifestly bad; the knowledge of their agent that this was the Nizam's property must be their knowledge: *Juan Ysmael & Co. Inc. v. Indonesian Republic Government*.²³

This debt is a chose in action, and it is impossible to have possession of a chose in action: *In re V.M.G. Holdings Ltd.*,²⁴ per Lord Greene M.R.²⁵ The meaning of chose in action was discussed by Fry L.J. in *Colonial Bank v. Whinncy*²⁶; and in *Torkington v. Magee*²⁷ Channell J. said that a chose in action described all personal property which could be enforced by action and not by taking possession. There can be no possession or control of a pure debt: *Haile Selassie v. Cable and Wireless Ltd.*²⁸

The locus classicus for the definition of the doctrine of sovereign immunity is the speech of Lord Atkin in the *Cristina* case.²⁹ The basis of the doctrine is that it would be unseemly to bring the servants of a foreign State into conflict with the officers of the court, but when the property is in the hands of a third party not connected with his entourage those considerations do not apply: *The Abodi Mendi*.³⁰

There are cases, however, where a foreign sovereign can be impleaded: per Lord Radcliffe in the *Dollfus Mieg* case³¹; and there is no absolute rule in English law that an independent

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²¹ 5 Ch.D. 605.

²² [1923] 1 Ch. 385.

²³ [1955] A.C. 72; [1954] 3 All E.R. 236.

²⁴ [1942] Ch. 235; 58 T.L.R. 131;

[1942] 1 All E.R. 224.

²⁵ [1942] Ch. 241.

²⁶ (1885) 30 Ch.D. 261; 1 T.L.R.

636.

²⁷ [1902] 2 K.B. 427; 18 T.L.R. 703.

²⁸ [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

²⁹ [1938] A.C. 490.

³⁰ [1939] P. 178; 55 T.L.R. 451;

[1939] 1 All E.R. 701.

³¹ [1952] A.C. 616.

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foreign sovereign cannot be impleaded in our courts in any circumstances: *Sultan of Johore v. Abubakar Tunku Aris Bendahar*.³² The doctrine cannot be invoked by a claim to possession or control of property in England, which is exercisable only through a third party whose title, possession or control, whatever it may be, was acquired in this country and is wrongful and illegal according to English law. [Reference was made to an article by Professor Hamson in the British Year Book of International Law, 1950, at p. 293 and at pp. 319-320.]

On Rahimtoola's own evidence there is a trust of this property, and where a trustee is faced with a demand for payment by a foreign sovereign it must be possible for the court to insist that he should prove his title; this proposition is supported by *Duke of Brunswick v. King of Hanover*.³³ Thus the Court of Chancery will not make an order against an ambassador who does not submit to the jurisdiction, but it will restrain a third party from giving him a fund, the right to which is in dispute, notwithstanding that his title to the fund may be absolute: *The Charkieh* ³⁴; see also *Gladstone v. Musurus Bey* ³⁵ and *Larivière v. Morgan*.³⁶ No injustice is thereby done to the sovereign and justice is done to the private suitor. Where a sovereign may be interested in funds which are the subject of a claim by some person and which are held by a trustee or third party over whom the court has jurisdiction, then, if the sovereign does not come forward to defend his interest, the court will not refuse to determine the issue, since its jurisdiction in that case is not over the sovereign or his property but over its own subjects and property within the jurisdiction: *Strousberg v. Costa Rica Republic*.³⁷ The cases establish that a court of equity will not refuse to administer a trust fund within its jurisdiction and hold up the distribution to the beneficiaries merely because a foreign sovereign claims to be interested; the sovereign must come in and prove his title, not merely assert it.

The second branch of the motion is that the plaintiffs made insufficient disclosure on the application for leave to serve out of the jurisdiction. The facts which it is alleged were not specifically brought to the notice of the court would not be any defence in the action. First, there is no suggestion of any intention to deceive the court. Secondly, if there was no intention to mislead the

³² [1952] A.C. 318, 343; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.

³³ 6 Beav. 1.

³⁴ (1873) L.R. 4 A. & E. 59, 98.

³⁵ 1 H. & M. 495.

³⁶ L.R. 7 Ch. 550, C.A.; (1875) L.R. 7 H.L. 423.

³⁷ (1880) 44 L.T. 199, 201.

court, were the facts not disclosed such that the court might have refused leave if those facts were before it? If so, then there is a discretion. But it must be shown that these facts would have reasonably been expected to have influenced the court.

It is accepted that these facts should have been disclosed, and it is not sought to support the affidavit, but even if it is unsatisfactory it is not necessary that the writ should be set aside. The matters not disclosed were available in documents, and none of the facts not disclosed was relevant to the question whether leave should be given. The claim to immunity does not have to be taken in limine; it is a claim which has to be determined in the action; it cannot be adjudicated on until after the service of the writ.

Where there is no deliberate intention to deceive the court, and it appears to the court that if the full facts had been known leave should have been given, then the writ will not be set aside for non-disclosure, although the parties may be punished in costs: see *Hardingham v. Rowan*³⁸; *Dickson v. Law and Davidson*³⁹; *Chemische Fabrik vormals Sandoz v. Badische Anilin und Soda Fabriks*,⁴⁰ and *National Mortgage and Agency Co. of New Zealand Ltd. v. Gosselin*.⁴¹ In the present circumstances the order giving leave should not be discharged: see *Ellinger v. Guinness, Mahon & Co.*⁴²

Geoffrey Cross Q.C., *Eustace W. Roskill Q.C.* and *Peter Foster* for the second defendant, the Westminster Bank Ltd. There are two questions: (1) whether an order should be made, and (2) whether, if an order is made, it should only stay proceedings as against Rahimtoola. The bank is a neutral party, but it is at an impasse, and if it were to pay this fund out to Rahimtoola it might also be liable to the Nizam. It is anxious to be discharged from its liability and does not wish to be called upon to pay twice. In the circumstances, if an order is made staying proceedings against Rahimtoola, they should also be stayed against the bank. On the whole the bank supports the argument on behalf of the plaintiffs.

The Government of Pakistan is plainly not being sued directly; it is not a party, but it is argued that the proceedings should be stayed because the Government is indirectly impleaded, since it has an interest in the subject-matter of the dispute. The application must rest on possession or control of that property and there

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³⁸ (1880) 24 S.J. 309.⁴¹ (1922) 38 T.L.R. 832.³⁹ [1895] 2 Ch. 62.⁴² [1939] 4 All E.R. 16.⁴⁰ (1904) 90 L.T. 733.

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can be cases, as shown in the *Dollfus Mieg* case,⁴³ where possession or control is enough; but there are three grounds on which that case is distinguishable: (1) There the gold bars were brought into this country in the possession of the foreign sovereign; it is another matter when the possession is wrongfully obtained or detained in this country. (2) The subject-matter in the *Dollfus Mieg* case⁴³ and in other cases where possession or control was sufficient was chattels—gold bars or ships. It is a practical difference when it is a question of a debt, as in the present case. On the question whether possession or control can apply in cases other than those of chattels, it must be remembered that Lord Greene M.R. said in the *Haile Selassie* case⁴⁴ that there can be no possession of a pure debt. (3) This is really a case of trust, assuming that the court takes the view that the beneficial interest remains in the Nizam. In *Duff Development Co. Ltd. v. Kelantan Government*⁴⁵ it was admitted that the debt belonged to the Government and in consequence garnishee proceedings could not issue.

It is a rule of the Court of Chancery that where someone is equitably entitled to a debt and he wishes to enforce that debt he must bring the legal owner before the court, but if, owing to the rules of international law, it is impossible to bring the legal owner of the debt before the court, the action should not for that reason be held up.

The first defendant, Nawab Moin Nawaz Jung, was not represented by counsel and did not appear.

McKenna Q.C. in reply. It has been proved that the legal right to the account was acquired by Rahimtoola as the servant of the Government of Pakistan and that it is held by him in that capacity. The Government does not admit any allegation in the statement of claim except that the money was transferred to Rahimtoola on Moin's instructions from an account which had previously been in the name of the Nizam.

[UPJOHN J. What beneficial claim, if any, does the Government of Pakistan make to this sum of money?]

The Government's attitude is that the court has no jurisdiction on this motion to inquire into the terms of this transfer.

[UPJOHN J. Do you on this motion rest any claim on any assertion that the Government of Pakistan is the beneficial owner or has any beneficial interest in this sum?]

⁴³ [1952] A.C. 582.

⁴⁵ [1923] 1 Ch. 385, 399.

⁴⁴ [1938] Ch. 847.

No. The claim rests on the legal title. If I have to disprove that the equitable interest is in other persons, I can see that I have not done so, but it is submitted that it is not necessary. It is not admitted that Moin made the transfer without authority.

The court has no jurisdiction to make any order in the suit against Rahimtoola or the bank which would interfere with the interest of the Government of Pakistan, and the relief sought in this action would interfere with their interest; the Government is therefore indirectly impleaded within the second part of the rule laid down by Lord Atkin in *The Cristina*,⁴⁶ because (1) the legal right has been acquired by Rahimtoola acting as the servant of the Government, and a legal right so acquired is property within the rule; (2) the Government through the legal right acquired in this way has control, that right is protected.

It was argued that the money plainly belongs in equity to the Nizam. To determine that, two questions must be answered: (1) had Moin authority to make the transfer; and (2) on what terms did he do it; was it on terms to preserve the equity? Neither of those is a question to be determined on the motion, which is to determine whether the defendant's contention is right that the court has not jurisdiction to go into these questions. It was also argued that one could not have control of a chose in action, and that the legal title not being in the Government of Pakistan they were not in control. But it would be strange if the transfer to Rahimtoola's account, in which he was described as High Commissioner for Pakistan, did not give the Government control.

It would be to determine the matter on very fine distinctions if it rested on whether the account was in the name of the Government of Pakistan or its Finance Minister or its High Commissioner. Jenkins J. in the *Dollfus Mieg* case⁴⁷ said that the actual physical possession of property (apart from the case of a foreign sovereign visiting this country) cannot be in the sovereign otherwise than by its servants, and he did not think that it would be right to make the application or exclusion of the principle of immunity turn on nice distinctions respecting the particular mode in which a foreign sovereign might exercise dominion over his property. That passage was quoted with approval by the House of Lords.⁴⁸ No authority was cited to show that the legal right acquired in this manner was not protected. A sovereign is indirectly impleaded if an action is brought which will interfere

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⁴⁶ [1938] A.C. 485, 490.⁴⁸ [1952] A.C. 582, 606.⁴⁷ [1949] Ch. 369, 389.

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with some interest of the sovereign in such a way that the sovereign would be a proper party to the action: see *The Cristina*,⁴⁹ per Lord Wright.

As to the argument that this is trust property held by a third party in England and acquired wrongfully according to the law of England, to defeat the claim to immunity on this proposition is to ask the court to hold that it is established that Rahimtoola's title was clearly wrongful, although that has not been established. Moreover, the authorities are against the view that it makes any difference that the title was acquired wrongfully, or that the possession or control is sought to be exercised through a servant whose title was acquired in this country in a way which was wrongful or illegal. All that matters is to have control: see *The Cristina*, per Lord Wright.⁵⁰ If that argument had been right the House of Lords in *The Cristina*⁵¹ would have gone into the fact that the possession of the Spanish agent was wrongful. The same view was taken in the *Arantzazu Mendi*⁵²; see also *The Cristina*⁵³ in the Court of Appeal, per Greer L.J.,⁵⁴ and *The Jupiter*.⁵⁵

On the question of a trust, the argument is only applicable where the property is in the hands of persons not the sovereign's representatives: see Dicey, at pp. 133, 134, and *Larivière v. Morgan*.⁵⁶ This case is distinguishable from *Larivière v. Morgan*⁵⁶; the High Commissioner cannot possibly be considered to be holding this money as a third party, and in that case the French Government had not objected to an inquiry as to whether the money was impressed with a trust. The other decisions, such as *Gladstone v. Musurus Bey*⁵⁷ and *Marshall v. Grinbaum*,⁵⁸ are not authorities on this motion in so far as it relates to Rahimtoola. In determining whether there are proceedings against the property of a foreign sovereign *Twycross v. Dreyfus*⁵⁹ should be considered.

The article by Professor Hamson has not really appreciated the point of *The Jupiter* (No. 3)⁶⁰; that was an action between private persons and no question of sovereign immunity arose. No authority is shown for the view that when the property is held by the sovereign's representative the court can intervene and inquire into what terms that property is held on. To allow this

⁴⁹ [1938] A.C. 485, 505.

⁵⁰ Ibid. 508, 509.

⁵¹ [1938] A.C. 485.

⁵² [1939] P. 37; [1939] A.C. 256.

⁵³ [1937] 4 All E.R. 313.

⁵⁴ Ibid. 318, 319.

⁵⁵ [1924] P. 236.

⁵⁶ L.R. 7 Ch. 550.

⁵⁷ 1 H. & M. 495.

⁵⁸ (1921) 37 T.L.R. 913.

⁵⁹ 5 Ch.D. 605.

⁶⁰ [1927] P. 122, 250; 43 T.L.R. 210, 741.

motion would involve no extension of the doctrine of sovereign immunity, which lays down in general terms that where property is held by a sovereign or his representative the court should not interfere.

As to the second ground, failure to disclose all the relevant facts, only one of the cases cited was relevant, and that laid down no general rule. If the failure was due to carelessness, then the writ should be discharged. [Reference was made to *Republic of Peru v. Dreyfus Bros. & Co.*,⁶¹ *The Hagen*⁶² and *Lazard Bros. & Co. v. Midland Bank Ltd.*⁶³]

Cur. adv. vult.

July 30. UPJOHN J., having stated the facts set out above, read the following judgment: There are certain preliminary matters with which I must deal before turning to the real point in this motion. It was submitted by Sir Andrew Clark for the plaintiffs that the debt, even before its transfer to Rahimtoola, was a trust fund constituted by the Nizam under a firman dated June 26, 1948, for the purchase of machinery, and that Moin in breach of trust and in breach of his duty as the officer of the Nizam's Government illegally transferred the said sum to Rahimtoola. Even if that be established, it does not advance the plaintiffs' case against Rahimtoola or the bank, for they have failed to establish, on the evidence before me, that Rahimtoola knew of that illegality, and they do not even allege knowledge by the bank in the statement of claim. But in fact the plaintiffs have not, in my judgment, established that part of their case. According to the evidence, the Nizam was at the material time an absolute monarch who enjoyed uncontrolled sovereign powers, and there was no difference between State property and the Nizam's personal property. The Nizam normally acted by issuing decrees or firmans, but he could at any time alter or revoke any firman, as I understand it, by another firman or other orders. The fact that by a firman the fund had been earmarked for the purchase of machinery could not be said to have constituted it a trust fund. It remained throughout the Nizam's own money, and he could deal with it as he pleased at any moment, revoking any instructions with regard to its use which he had given to his officials and substitute other instructions. Nor, in my judgment, is it proved that Moin or Mir acted in breach of their duty in ordering transfer of the debt to

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⁶¹ (1886) 55 L.T. 802.

⁶³ [1933] A.C. 289; 49 T.L.R. 94.

⁶² [1908] P. 189, 201.

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Rahimtoola. It is clear on the evidence that they had no implied authority to give directions with regard to the debt by virtue of their respective offices. They could only act on the instructions of the Nizam; but the Nizam could at any moment give directions, that might be by a public firman or by a personal order. True, no record of any such order by the Nizam can be found, but in the circumstances that is not surprising. The State of Hyderabad was being overrun. If this was an attempt to cover up property of the Nizam against subsequent depredations by a possibly victorious Indian army publicity would be fatal. No one has sworn that the transfer was against the personal orders of the Nizam, but only that no trace of any such order can be found. In these circumstances I do not accept it as proved that Moin or Mir acted in breach of their duty as officers of the Nizam.

One further preliminary matter must be stated. The legal title to the debt remains in Rahimtoola. He does not make and never has made any claim to any personal beneficial interest in the fund. He claims it on behalf of his Government. While Rahimtoola has very fully explained what took place at the interview, there is no evidence on behalf of the Government of Pakistan as to why the transfer was made, and the Government declined my invitation, as they were perfectly entitled to do, to file evidence upon that matter. Therefore I can only draw an inference as to the probable reason for the transfer from the evidence before me in the light of the important consideration that at the time of the transfer Hyderabad was under invasion. The probable reason was a desire, and a reasonable desire, to try to keep this sum from being claimed by a possibly victorious Indian Government; but whether that be so or not (and I express no concluded view upon that) in so far as the equitable title of the Government of Pakistan to the debt is relevant, in my judgment, for the purposes of this motion, they do not establish a scintilla of such a title; and, in his reply, Mr. McKenna, for Rahimtoola, concedes that he cannot rely on an equitable title.

In these circumstances the Government of Pakistan claims that to sue Rahimtoola is to implead a foreign sovereign State.

The locus classicus for the statement of the relevant principles is to be found in the speech of Lord Atkin in *Compania Naviera Vascongada v. S.S. Cristina*¹; but it is sufficient for my purpose to take a briefer statement of the law to be found in the speech of Lord Radcliffe in the later case of *United States of America and Republic of France v. Dollfus Mig et Cie S.A.*

¹ [1938] A.C. 485, 490; 54 T.L.R. 512; [1938] 1 All E.R. 719.

and Bank of England.² After referring to Lord Atkin's speech, he said³: "For myself I think that the range and purpose of "our rule is expressed as well as may be in Dicey's Conflict of "Laws, 6th ed., p. 131: 'The court has . . . no jurisdiction to "entertain an action or proceeding against (1) any foreign "sovereign. . . . Any action or proceeding against the property "of [a foreign sovereign] is an action or proceeding against "such person.'"

There was some debate before me as to the distinction which has been drawn in some of the authorities between direct and indirect impleading and as to the meaning of the latter phrase. The preponderance of judicial authority is in favour of the view that indirect impleading is merely a convenient method of describing proceedings in rem against a ship in which a sovereign claims some interest, as in such proceedings claimants are not actually named as parties in the writ: see *Haile Selassie v. Cable and Wireless Ltd.*,⁴ and per Lord Jowitt in the *Dollfus Mieg* case.⁵

It is unnecessary for me to discuss this matter, for it is clear that in this case the sovereign is not directly impleaded; that is to say, he is not named as a party. No claim to immunity is made on behalf of Rahimtoola personally, for example, that he is in the position of an ambassador, for at the date of the writ he held no such position: The claim to immunity can therefore only succeed in this action if it be shown that some property of the foreign sovereign is thereby affected, and it does not seem to matter very much whether or not that be described as indirect impleading.

In the next place, there has been much discussion in the authorities as to what is a sufficient interest in the property to establish a claim for immunity from process. When the subject-matter of the dispute is a chattel such as a ship or bar of gold, possession or control are very relevant matters to consider upon the claim to immunity; but in relation to a pure debt unsupported by pledge or other security such as a bearer bond, the question must depend upon title and nothing else. There can be no possession or control of a pure debt: *Haile Selassie v. Cable and Wireless Ltd.*⁶

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² [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

³ [1952] A.C. 615, 616.

⁴ [1938] Ch. 839, 845; 54 T.L.R. 996; [1938] 3 All E.R. 384.

⁵ [1952] A.C. 604.

⁶ [1938] Ch. 847.

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Next, it must now be taken as settled law that it is not sufficient to establish a claim to immunity that the foreign sovereign should merely make a claim to such property. I take the law to be as stated in the judgment of Lord Jowitt in the Privy Council in *Juan Ysmael & Co. Inc. v. Indonesian Republic Government*⁷: "In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

The question, then, that I have to consider is whether the Government of Pakistan establish a title to this debt which is not merely illusory or manifestly defective. It is submitted on the Government's behalf that a sufficient title is in them by reason of the fact that the legal title to the debt is admittedly in Rahimtoola in his official capacity of High Commissioner of Pakistan and in no other capacity whatever. The fact that on the evidence as it stands at present the Government show no equitable title, counsel submits, matters not. He submits (rightly, in my view) that it is well settled in the case of chattels that a proprietary interest need not be established, but possession or control is sufficient, and in such cases whether possession or control was rightful has always been considered irrelevant. Thus, in *The Jupiter*,⁸ it was regarded as irrelevant that the possession of the U.S.S.R. was wrongful, as it was subsequently proved to be: *The Jupiter* (No. 3)⁹; but that was a case of impleading a sovereign State in an action in rem. However, in the *Dollfus Mieg* case,¹⁰ where no question arose of impleading the foreign governments by making them parties directly or in an action in rem, the rightfulness of the claim to some bars of gold was regarded as irrelevant; the right to immediate possession was sufficient.

⁷ [1955] A.C. 72, 89; [1954] 3 All E.R. 236.

⁸ [1924] P. 236; 40 T.L.R. 815.

⁹ [1927] P. 122, 250; 43 T.L.R. 210, 741.

¹⁰ [1952] A.C. 582.

The judgment of the Privy Council in the *Juan Ysmael* case ¹¹ clearly proceeded on the footing that the claim to title of the ship there in question was plainly bad, and that the claim to immunity therefore failed; but it is clear that the whole case proceeded on the footing that the Indonesian Government did not at the relevant time have possession or control of the ship, for the acting captain of the ship always remained true to his masters, the appellants. The law was briefly summarized by Lord Maugham in the *Cristina* case ¹² thus ¹³: "If the foreign government wishes to recover property in this country, I am of opinion that it must, subject to certain exceptions, prove its case. If it is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to or any interest in such property."

Sir Andrew Clark, on the other hand, submits that Rahimtoola was a trustee of the debt for the true owner, the Nizam. He referred me to a number of authorities which he submits establish the proposition that where property such as a debt is in a third party claiming no beneficial interest therein, as in this case, then before a foreign sovereign can be said to be impleaded he must show a title to that property which is not illusory or manifestly defective. He relied on two lines of cases. The first deals with the position at common law. Lord Maugham in the *Cristina* case ¹⁴ put it thus ¹⁵: "An independent sovereign sued for breach of promise of marriage in our courts can indeed claim to be outside of our jurisdiction; but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person to recover possession of the jewellery merely by stating that he claimed it. To come within Professor Dicey's rule he would in my opinion be bound to prove his title." This statement of the law, however, is not universally accepted: see the observations of Lord Jowitt in the *Dollfus Mieg* case, ¹⁶ which I quote later.

In equity the courts have been less tolerant of a claim to immunity than at common law. Sir Andrew cited to me a number of authorities which establish the proposition that the court will not decline jurisdiction to administer a trust fund merely because a foreign sovereign claims to be interested therein. It

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¹¹ [1955] A.C. 72.¹² [1938] A.C. 485.¹³ Ibid. 517.¹⁴ [1938] A.C. 485.¹⁵ Ibid. 517.¹⁶ [1952] A.C. 607.

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was put in this way in *Strousberg v. Costa Rica Republic*¹⁷ by James L.J.¹⁸: "There is one other class of cases to which the Master of the Rolls has referred, which may appear to be also an exception, and that is the case in which a foreign sovereign may be named as a defendant, for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this court has jurisdiction. The trustee is within the jurisdiction of the court, and the trustee holds the funds; and if a person says, 'I call upon A.B. the trustee of the fund to pay it to me because it belongs to me,' and A.B. the trustee says, 'I cannot pay it to you because there is a foreign sovereign interested,' then you say, 'Well, the foreign sovereign may, if he thinks fit, come here to defend himself;' and if he will not come here to defend his right or his interest in that fund, in that case the trustee must do it for him, or leave it undone. The only jurisdiction of the court in that case is not a jurisdiction over the sovereign, or over the sovereign's property; but simply over its own subjects, and over property which is within its own jurisdiction." See also *Duke of Brunswick v. King of Hanover*,¹⁹; *Gladstone v. Musurus Bey*²⁰; *Larivière v. Morgan*²¹ (reversed on the facts in the House of Lords).²²

If Rahimtoola is indeed to be regarded as truly a third party holding the debt as a trustee for the true owner, then, in my judgment, both at common law and in equity, before the Government of Pakistan can be said to be impleaded it must establish a title to the debt. That title must necessarily be an equitable title in the circumstances of this case, for the legal right to the debt is in Rahimtoola. It may be that, if a court is administering a trust, the sovereign must establish a true title, whereas at common law it is only necessary to establish a title not manifestly defective; but it is not necessary to consider that further, for in this case the sovereign establishes no title in equity, and, in my judgment, neither in law nor in equity is the sovereign impleaded.

The crux of this case, therefore, is whether Rahimtoola is to be regarded as a third party holding the debt for the true owner. Although Rahimtoola makes no claim to immunity on any ground personal to him, it seems to me clear that the debt was vested in him as an official of his Government. The debt was not vested in "the Government of Pakistan" eo nomine, but it was

¹⁷ (1880) 44 L.T. 199.

¹⁸ Ibid. 201.

¹⁹ (1844) 6 Beav. 1.

²⁰ (1862) 1 H. & M. 495.

²¹ (1872) L.R. 7 Ch. 550.

²² (1875) L.R. 7 H.L. 423.

vested in a servant of that Government in his capacity as such. That was a natural course to take in the circumstance. I do not think that I ought to draw narrow distinctions between title to a debt in the name of the sovereign or his servant.

Lord Jowitt, in the *Dollfus Mieg* case,²³ said²⁴: “Jenkins J. in the course of his judgment, to which I would desire to express my indebtedness, expresses the matter as follows²⁵: “‘A foreign sovereign State (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign State were essential to immunity on the score of possession by such State, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign State (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign State might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold were brought to this country by a foreign sovereign State to be applied in the purchase of goods for the public purposes of that State and placed in the hands of a servant of the State concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign State, irrespective of any immunity from process the servant might be entitled to claim in his own person. If on the other hand gold brought to this country by a foreign sovereign State for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think it would be right to make the application or exclusion

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²³ [1952] A.C. 582.

²⁵ [1949] Ch. 389.

²⁴ Ibid. 606.

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“ ‘ of the principle of immunity (based as it is on substantial reasons of policy) turn upon nice distinctions of this kind.’ ”
Lord Jowitt continued ²⁶: “ Although I agree with the observations of Lord Maugham in *The Cristina* ²⁷ that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited the result would be that if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee, claiming the delivery of the article which had been deposited by or on behalf of that sovereign.”

In the same case Lord Porter said ²⁸: “ No doubt the doctrine should, as Lord Maugham said in *The Cristina*,²⁹ be narrowly watched, but it has always to be remembered that governments must act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession.”

Those were all cases dealing with chattels; but, in my judgment, the same reasoning ought to apply to the case of a debt. No case in this country has been cited to me which is on all fours with this case; but a claim to immunity in respect of a debt has been upheld in the District Court of New York in *Bradford v. Chase National Bank of City of New York*,³⁰ a case reversed on its facts on appeal. However, the recent authorities undoubtedly contain warnings against extending the doctrine of sovereign immunity from process: see especially the observations of Lord Maugham in the *Cristina* case.³¹ There is, then, no absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances: *Sultan of Johore v. Abubakar Tunku Aris Bendahar*.³² Furthermore, this is not a case where the foreign sovereign has brought any property to this country; it has been transferred to him by the servants of another sovereign.

In my judgment, however, the general principle must be applied. The debt being in Rahimtoola as the servant of his Government, the matter must be treated as though the debt was due to the Government, though that does not, of course, entitle

²⁶ [1952] A.C. 607.

²⁷ [1938] A.C. 485, 519.

²⁸ [1952] A.C. 612.

²⁹ [1938] A.C. 485, 518.

³⁰ (1938) 24 Fed.Supp. 28.

³¹ [1938] A.C. 485.

³² [1952] A.C. 318; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.

the Government to claim immunity on the ground that it is being directly impleaded.

The plaintiffs, however, seek to go behind that legal title and to show that, on an investigation of the circumstances surrounding the transfer and applying the municipal law of England, the equitable title is in the plaintiffs. In my judgment, however, being, in effect, clothed with the legal title, it is to that very investigation into the equitable title which the Government of Pakistan as a sovereign State is entitled to decline to submit. In my judgment its insistence on its legal title is sufficient to support the claim to immunity, even though no equitable title is shown, and the claim would therefore seem to involve a wrong against the equitable owner. The case is analogous to wrongful possession of a chattel in the hands of the servant of a foreign State.

The theory behind the claim to immunity has been variously described, and I attempt no repetition; but I think the following quotation from Sir Robert Phillimore in *The Charkieh*³³ seems particularly appropriate to the circumstances of the present case³⁴: "The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign State . . ." The present transaction was an intergovernmental transaction; let it be solved by intergovernmental negotiations. The writ and concurrent writ must be set aside as against Rahimtoola.

With regard to the bank, the plaintiffs are suing the bank for the debt due at law to Rahimtoola. Proceedings must be stayed against them, for to continue to sue them is to interfere with the property of the sovereign. That is clearly the proper course when dealing with a claim in detainue: see *Dollfus Mieg*.³⁵ This cannot be likened to the case of a claim for damages for conversion. In this case, unlike the claim in respect of the 13 bars of gold in the *Dollfus Mieg* case,³⁵ there is no claim for damages against the bank, nor does this case resemble the *Haile Selassie* case.³⁶ The question there was to whom were Cable and Wireless Ltd. indebted? In this case, so far as the bank is

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³³ (1873) L.R. 4 A. & E. 59.

³⁴ Ibid. 97.

³⁵ [1952] A.C. 582.

³⁶ [1938] Ch. 839.

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concerned, there is only one answer to that question—Rahimtoola. Both Moin and Mir had authority to operate the account, and the statement of claim does not allege that the bank had any knowledge of the alleged but, as I have held, unproved breaches of duty by Moin or Mir. The plaintiffs can only reach the debt through Rahimtoola. Therefore the action against the bank must be stayed.

It becomes unnecessary, therefore, to consider the second ground on which the motion is based, namely, that the relevant facts were not fully disclosed on the application for leave to issue a concurrent writ. It is right, however, that I should say this, that it is now conceded that there was not a full disclosure; but I accept the apology which on affidavit has been tendered to this court, and am satisfied that there was no intention whatever to mislead.

The actual form of order will be: That the writ of summons issued in this action and the concurrent writ of summons and all the subsequent proceedings may be set aside as against the defendant Rahimtoola; and that the action be stayed as against the defendant the Westminster Bank Ltd.

*Judgment on the motion for the
third defendant.*

I. G. R. M.

The first plaintiff, the Nizam of Hyderabad, appealed. Before the appeal was heard the second plaintiff, the State of Hyderabad, by assignment of October 27, 1956, assigned all its interest in the moneys in dispute to the Nizam, and on November 1, 1956, after that assignment the State of Hyderabad as the result of the Indian States Reorganization Act, 1956, ceased to exist and the appeal was continued by the Nizam alone, who became the sole plaintiff.

The Nizam, before the hearing in the Court of Appeal, filed an affidavit in which he stated that the fund had been transferred to Rahimtoola without the Nizam's authority.

The evidence is more fully stated in the judgment of Lord Evershed M.R.

The defendant Moin had not entered an appearance and was not represented.

Sir Andrew Clark Q.C. and *S. B. R. Cooke* for the Nizam of Hyderabad. The judgment from which the Nizam appeals extends the doctrine of sovereign immunity far further than any other case has done. The decision in *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England*¹ is the high-water mark of the doctrine: the House of Lords has said that it should not be extended. In this case Pakistan claims no estate or interest in the debt and there is therefore no question of impleading that State. If Upjohn J. is right Pakistan must be deemed to be clothed with a legal estate. Rahimtoola held as a trustee and the State is in no better position. The trust cases lay down an exception to the general rule of sovereign immunity. It has never been applied so as to prevent the courts from ascertaining the true owner of trust property.

The first contention is that this is not a case of impleading a foreign sovereign. The Nizam was the owner of these moneys in 1948 and the bank owed the moneys to him. Moin and Mir had a limited authority to obtain payment of the moneys from the bank and to give a good receipt. Moin, without the knowledge or the authority of the Nizam, used his legal right to obtain the transfer of the moneys into the name of Rahimtoola who knew, when the transfer was made, that he was receiving moneys which were the property of the State of Hyderabad. All the reported decisions relate to cases where the foreign sovereign himself brought moneys into this country. If these moneys had been handed to the State of Pakistan and put in a bank in the name of the State, then this case would be within Lord Maugham's opinion in *Compania Naviera Vascongado v. S.S. Cristina*.² A debt is a mere chose in action. The relation between a banker and customer is that of debtor and creditor: *Foley v. Hill*³; *In re Westerton*.⁴ There cannot be possession, occupation or enjoyment of a chose in action, except by the holder of the legal title. It is a personal right which can only be enforced by action: see *per* Channell J. in *Torkington v. Magee*⁵ and *per* Fry L.J. in *Colonial Bank v. Whinney*.⁶ The foreign sovereign, not being possessed of the debt, must rely on the legal title:

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¹ [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

² [1938] A.C. 485; [1938] 1 All E.R. 719; sub nom. *The Cristina*, 54 T.L.R. 512.

³ (1848) 2 H.L.C. 28.

⁴ [1919] 2 Ch. 104.

⁵ [1902] 2 K.B. 427, 430; 18 T.L.R. 703.

⁶ (1885) 30 Ch.D. 261, 285; 1 T.L.R. 636.

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*In re V.G.M. Holdings Ltd.*⁷ *Haile Selassie v. Cable and Wireless Ltd.*⁸ is not on all fours with the present case, because the holder is not a third party but is said to be the agent of the Government. That decision does show that possession and control do not apply to a chose in action. The court can here proceed in the absence of the foreign sovereign, since the legal title is not in the foreign sovereign. No question of personal immunity arises, because Rahimtoola is not now High Commissioner in this country. *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England*⁹ is different from the present case. There the court was concerned with a chattel and not a chose in action. If this were the case of a foreign sovereign itself collecting money and entrusting it to a third person, the foreign sovereign would be entitled to set up its own title, because it could require its own agent to account to itself. The test is whether the agent is bound to account to the foreign sovereign. Rahimtoola is not bound to account to the State of Pakistan. He took the money for safe custody for the Nizam and he must regard himself as holding it for the Nizam. [Reference was made to *Sultan of Johore v. Abubakar Tunku Aris Bendahar*.¹⁰]

This case would be covered by *Juan Ysmael & Co. Inc. v. Indonesian Republican Government*¹¹ if Rahimtoola had at the time of transfer known that Moin's authority was defective. The American decision in *Bradford v. Chase National Bank*¹² is not directly in favour of the Nizam. The French decision in *L'Affaire Vestwig*, quoted in the British Year Book of International Law, vol. 27 (1950), pp. 293, 298, is near this case.

For the doctrine of sovereign immunity to apply, the case must be brought within the quotation from Dicey's Conflict of Laws, 6th ed., p. 131, cited by Lord Radcliffe in the *Dollfus Mieg* case,¹³ where he states that the courts have no jurisdiction to entertain an action against the property of a foreign sovereign. The question is, what is the meaning of "property"? It is submitted that it means property which belongs to the foreign sovereign or of which he is in de facto control. Here the foreign sovereign has not got possession or control. It is necessary for the sovereign to show a legal or equitable title. Nor is that

⁷ [1942] Ch. 235; 58 T.L.R. 131; [1942] 1 All E.R. 224.

⁸ [1938] Ch. 839; 54 T.L.R. 996; [1938] 3 All E.R. 384.

⁹ [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

¹⁰ [1952] A.C. 318; [1952] 1 T.L.R. 1106; [1952] 1 All E.R. 1261.

¹¹ [1955] A.C. 72; [1954] 3 All E.R. 236.

¹² (1938) 24 Fed.Supp. 28.

¹³ [1952] A.C. 582, 615.

necessarily enough. There is no immunity unless the proceedings are against the sovereign. Here the State of Pakistan does not claim an equitable title. It must accordingly show it has a legal title. If Rahimtoola were an integral part of the Government of the State of Pakistan, he might be said to be the agent of the State, but that was not the case. At the relevant date he was not entitled to diplomatic immunity. The onus of proving sovereign immunity rests on the foreign sovereign. [Reference was made to *Baccus S.R.L. v. Servicio Nacional del Trigo*.¹⁴]

If the appellant is wrong in his first contention, then it is submitted that Rahimtoola and the foreign sovereign hold this debt upon trust for the true owner. If the sovereign is a bare trustee for the true owner the doctrine of sovereign immunity does not arise. The English courts will adjudicate upon the claims of the persons severally claiming to be beneficially interested. The position was clearly stated by Channell J. in *Henry v. Hammond*.¹⁵ *Duke of Brunswick v. King of Hanover*¹⁶ shows that the court will investigate the equitable title. [Reference was made to *Gladstone v. Musurus Bey*,¹⁷ *Larivière v. Morgan*¹⁸ and *In re Russian Bank for Foreign Trade*.¹⁹]

There is no direct authority for saying that where a foreign sovereign is a trustee he can be made a party and sued; *Gladstone v. Musurus Bey*²⁰ is the nearest case. Where the trust property is vested in an agent of the foreign sovereign such sovereign can become a party to any proceedings or not as it pleases. An order can be made against the agent. If the foreign sovereign is not made a party, the proceedings would not be defective for lack of parties. [Reference was made to *Strousberg v. Republic of Costa Rica*²¹ and *The Charkieh*.²²] All the relief the appellant seeks can be granted without any order which would affect the State of Pakistan. Upjohn J. had no evidence before him that the transfer to Rahimtoola had been made without the Nizam's authority. If he had had that evidence, which is now before the court, he might have reached a different conclusion.

S. B. R. Cooke following. No case to discontinue these proceedings has been established at this stage of the action. [*The Sylvan Arrow*²³ was referred to.]

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¹⁴ [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715.

¹⁵ [1913] 2 K.B. 515, 520; 29 T.L.R. 340.

¹⁶ (1844) 6 Beav. 1.

¹⁷ (1862) 1 H. & M. 495.

¹⁸ (1872) L.R. 7 Ch. 550; (1875) L.R. 7 H.L. 423.

¹⁹ [1933] Ch. 745; 49 T.L.R. 253.

²⁰ 1 H. & M. 495.

²¹ (1880) 29 W.R. 125.

²² (1873) L.R. 4 A. & E. 59, 97.

²³ [1923] P. 14; 39 T.L.R. 25.

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Geoffrey Cross Q.C., Eustace W. Roskill Q.C. and Peter H. B. W. Foster for the Westminster Bank. Before Upjohn J. the bank supported the Nizam and it does so on this appeal, except that it objects to the action continuing against the bank should the proceedings against Rahimtoola be stayed. The Nizam should not be allowed to continue the action in the absence of the legal owner of the debt. The Nizam's affidavit has altered the position. If it is accepted that Moin had no authority, it is difficult to see how the Nizam was bound by the transfer. [Reference was made to *Performing Right Society Ltd. v. London Theatre of Varieties Ltd.*²⁴]

B. J. M. MacKenna Q.C., R. O. Wilberforce Q.C. and Oliver R. Smith, for the defendant Rahimtoola, stated that they were also instructed by the State of Pakistan, who were not parties to the action. This defendant bases his case on the passage cited from Dicey's *Conflict of Laws*, 6th ed., p. 131, in the *Dollfus Mieg* case.²⁵ "Property" there means anything under the control of the foreign sovereign. An action is against the foreign sovereign's property, if the nature of the relief sought is such that were it granted it would interfere with the foreign sovereign's property. That was the test applied by Jenkins J. in the *Dollfus Mieg* case²⁶ and approved by the House of Lords.²⁷ That principle extends to property in the widest sense and includes choses in action. That was recognized by the Court of Appeal in *Duff Development Co. Ltd. v. Government of Kelantan and the Crown Agents for the Colonies*.²⁸ Further, the foreign sovereign is not bound as a condition of obtaining the immunity to prove a full and perfect title to the interest claimed. It is enough if it is established that there are conflicting and competing rights; as soon as that is established the proceedings must be stayed: *Juan Ysmael & Co. Inc. v. Indonesian Government*,²⁹ the *Dollfus Mieg* case³⁰ and *The Arantzazu Mendi*.³¹

Here the State of Pakistan has proved that it acquired the legal title to the debt through its servant Rahimtoola acting as such. For the purpose of the doctrine there is no distinction between a title acquired by the foreign sovereign in his own name and one acquired in his servant's name, or between one acquired in the name of the High Commissioner and one acquired in the name of the State's Finance Minister. Pakistan has accordingly

²⁴ [1924] A.C. 1; 40 T.L.R. 52.

²⁵ [1952] A.C. 582, 615.

²⁶ [1949] Ch. 369, 389.

²⁷ [1952] A.C. 582, 606.

²⁸ [1923] 1 Ch. 385; 39 T.L.R. 187.

²⁹ [1955] A.C. 72, 89.

³⁰ [1952] A.C. 582.

³¹ [1939] P. 37; 55 T.L.R. 71.

brought itself within the principle, as Rahimtoola has proved enough to require the action to be stopped.

This case does not come within the principle of the so-called trust cases. That principle arises where a foreign sovereign claims a beneficial interest in property vested in a trustee who is truly a third party. In such a case the court may inquire into equitable claims and administer the trust fund, notwithstanding the foreign sovereign's beneficial interest. The relief claimed here, if it were granted, would interfere with the debt which is the property in question.

Upjohn J. accepted the above propositions. Rahimtoola is not an independent third party. It has not been argued that he had no authority from the State of Pakistan to take the fund. What he did has been ratified by the State. He accepted the fund in his official capacity, on the direction of the Foreign Minister of Pakistan. The evidence discloses nothing to raise any doubt as to his capacity and authority. The High Commissioner is not an emanation of the State. He has, however, two rights: (1) personal immunity from suit; (2) a right which gives immunity to State property. This case falls under the second head. By the transfer, the State of Pakistan acquired power and control over the debt and Rahimtoola became bound to account to that State. It does not follow that, because the legal title is in the servant, the master has not got control. In the *Dollfus Mieg* case³² the sovereign had not got legal possession—that was in the bailee—but the gold bars were held to fall within the principle of sovereign immunity. The analogy between that case and the present is close. The right to the legal title is as good as the legal title.

[Reference was made to *Compania Naviera Vascongado v. S.S. Cristina*³³; *The Arantzazu Mendi*³⁴; *The Jupiter*³⁵; *The Jupiter* (No. 3)³⁶; *Juan Ysmal & Co. Inc. v. Indonesian Republican Government*³⁷; *Strousberg v. Republic of Costa Rica*³⁸; *Twycross v. Dreyfus*³⁹; *Larivière v. Morgan*,⁴⁰ and *Gladstone v. Musurus Bey*.⁴¹]

Any judgment founded on the premise that Rahimtoola intended to obey the directions of Pakistan in dealings with the

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³² [1952] A.C. 582. ³⁷ [1955] A.C. 72.
³³ [1938] A.C. 485. ³⁸ (1880) 44 L.T. 199; 29 W.R.
³⁴ [1939] A.C. 256; 55 T.L.R. 454; 125.
[1939] 1 All E.R. 719. ³⁹ (1877) 5 Ch.D. 605.
³⁵ [1924] P. 236; 40 T.L.R. 815. ⁴⁰ L.R. 7 Ch. 550; on appeal, L.R.
³⁶ [1927] P. 122, 250; 43 T.L.R. 7 H.L. 423.
741. ⁴¹ 1 H. & M. 495.

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fund should conclude that our courts could not interfere with that fund either (a) by inquiring whether it was held in trust for the Nizam and, if so, by administering the trust; or (b) by ordering Rahimtoola to pay over the fund to the Nizam in an action for money had and received; or (c) by making any order against the bank which would prevent Rahimtoola from dealing with the fund in accordance with the directions of Pakistan. Any judgment based on any premise of fact other than that Rahimtoola accepted the fund as agent for Pakistan and intended to obey the directions of that State would be inconsistent with the evidence. The State or Government of Pakistan could prevent him from transferring the fund to the Nizam himself, for an agent has no right to deal with property held for his principal except in accordance with his principal's orders. If, however, that submission is not accepted, and it is held that Rahimtoola held the fund for the benefit of the Nizam and that he would commit a breach of duty if he held it otherwise, it is not thereby conceded that the Nizam had any legal title to the fund, for he made it clear in a letter to the bank that he had not.

Either the money was paid on a misunderstanding as to the legal position or it was correctly understood that Pakistan was to have control of the fund and to decide when and in what circumstances it was to be retransferred, if at all. The State has proved that the fund is under its dominion and control and no more need be proved in order that the action should be stayed. In the *Dollfus Mieg* case ⁴² no title was shown to any of the funds.

The Nizam's case is by way of implied or resulting trust, and, secondly, he makes a claim at common law for money had and received. If the common law action does not lie, because it brings into question the sovereign's rights and seeks to interfere with his property, and because the sovereign would be a necessary party to that action, it would be strange if the Nizam could proceed against the agent in equity and achieve the same result. The exception to the rule of immunity, which is said to be established by the trust cases, does not extend to cases where the trustee is, as in the present case, the sovereign himself or his agent (*Strousberg v. Republic of Costa Rica* ⁴³), for administration of the trust would inevitably involve impinging on the control of the sovereign and on sovereign immunity.

The *Dollfus Mieg* case ⁴⁴ is in point. There is no difference in principle for this purpose between a chose in action and property

⁴² [1952] A.C. 582.

⁴⁴ [1952] A.C. 582.

⁴³ 44 L.T. 199.

of some other kind. Nor is it material to inquire by what means the sovereign claiming immunity obtained his interest: *The Jupiter*⁴⁵ and *Compania Naviera Vascongado v. S.S. Cristina*.⁴⁶ The *Dollfus Mieg* case⁴⁷ establishes that a sovereign's right to possession as bailor as against a bailee is sufficient to attract immunity and that it is not necessary to prove his title. There is for this purpose no distinction in principle between a bailee and a bailor and a servant and his master. If the sovereign has the right to direct the transfer of the fund to him, he has established his claim to immunity and it is unnecessary for him to make out a title to the beneficial interest. This case is stronger than the *Dollfus Mieg* case,⁴⁸ for here the sovereign has the legal title. It is true that in *The Arantzazu Mendi*⁴⁹ an interim injunction was granted, but the grant was not opposed by the sovereign.

The rights of Pakistan against Rahimtoola arise out of the relation of principal and agent; these are legal rights: Halsbury's Laws of England, 3rd ed., vol. I, p. 181. *Haile Selassie v. Cable and Wireless Ltd.*⁵⁰ is not in point, for in that case the issue was who was the sovereign. But Lord Greene M.R.⁵¹ treated the holding of property by the sovereign's agent and by the sovereign himself as being for these purposes indistinguishable. If the agent misspent the money in the account, an action would lie for the full amount, and it would be no answer for him to say that the equitable title was in someone else. A court of equity would not refuse to direct a transfer because the equitable interest was outstanding in some other person. The State of Pakistan should not have to submit to an action in order that the Nizam may establish his title.

If a servant refused to obey the directions of his master and to transfer a debt held by him as agent for his master, the court would give as damages the full amount of the debt. In an action brought by the master, the servant would be estopped from relying on imperfections of his master's title, either as a defence to the action or as a ground for reduction of damages. If, immediately after the fund had been transferred to Rahimtoola, the State had called on him to transfer the fund either to the State itself or to some third party and Rahimtoola had refused, it would not have been necessary to join the Nizam as a party to proceedings against Rahimtoola. Upjohn J. said that once the relation between

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⁴⁵ [1924] P. 236.⁴⁶ [1938] A.C. 485.⁴⁷ [1952] A.C. 582.⁴⁸ Ibid.⁴⁹ [1939] A.C. 256.⁵⁰ [1938] Ch. 839.⁵¹ Ibid. 844.

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Pakistan and the legal title had been shown, Pakistan could resist inquiry into the equitable interest. Evidence has now been produced which shows that the Nizam has the equitable title, but that does not affect the question of sovereign immunity. In many cases where sovereign immunity is invoked some party is deprived of a judgment in his favour, but the degree of interest required to attract immunity does not vary with the sovereign's chances of success in the action.

Although, as Jenkins L.J. said in *Baccus S.R.L. v. Servicio Nacional del Trigo*,⁵² the principle of immunity should not be extended, the fact that a particular transaction is held to fall within the rule does not amount to an extension merely because the occasion for its application to comparable facts has never before arisen.

Wilberforce Q.C. following. As in the *Dollfus Mieg* case,⁵³ the principle of sovereign immunity is potentially applicable because Rahimtoola is subject to the jurisdiction of a foreign sovereign. The Nizam's claim is for money had and received. A legal claim in contract such as this cannot be brought against a sovereign either directly or indirectly or through his agent. The claim is also put in equity, but, if it succeeded, it would operate to a substantial extent on the legal interest and the owner of that interest. [Reference was made to *In re Astor's Settlement Trusts*.⁵⁴] Where a sovereign is the trustee, the trust cannot be directly enforced at all. If the claim against the sovereign were allowed to proceed, and it succeeded, it would destroy the sovereign's legal interest. *The Parlement Belge*⁵⁵ shows that it is not right to put the sovereign into the dilemma of either having to come in as a party to defend his legal interest or else to let that interest go.

There are three possible views as to the capacity in which Rahimtoola holds the property; first, that he took and holds it as a principal and is not subject to the direction of Pakistan; secondly, that he holds as agent of Pakistan, and, thirdly, that he is under the direction of Pakistan but holds in his own right and proceedings could be brought against him personally. The evidence shows plainly that Rahimtoola did not regard himself as having any discretion as to how he was to act, nor did the State so regard him. It does not follow that because the fund was not put into the name of the State that it was not put under

⁵² [1956] 3 W.L.R. 948, 970.

⁵³ [1952] A.C. 582.

⁵⁴ [1952] Ch. 534; [1952] 1 T.L.R. 1003.

⁵⁵ (1880) 5 P.D. 197.

the control of the State. Rahimtoola was asked to take the fund in the capacity of High Commissioner, and the proper inference is that the intention was to give the proprietary interest to the State of Pakistan, through its selected intermediary. Even if it be assumed that the money was to be held on trust, the State would have been the sole trustee. As the relationship between the State and Rahimtoola was that of principal and agent, the principal alone would have been responsible for the enforcement of the trust. If, therefore, the beneficiary had heard that Rahimtoola had misapplied the trust moneys, or if for any other reason he sought to enforce the trust, he would have had to sue the State as trustee and not the trustee's agent: Lewin on Trusts (1950), 15th ed., p. 401, supported by *Attorney-General v. Earl of Chesterfield*.⁵⁶ It is equally plain that the trustee could sue his agent without having to join the beneficiary. The court could, at any time, at the suit of the State, have ordered Rahimtoola to transfer the fund without first giving notice to the Nizam and without regard to his wishes. Governments habitually act through agents and the evidence supports the view that that is what was being done here. If the State had sued the agent for the money, he would have been estopped from setting up a defect in his principal's title: Halsbury's Laws of England, 3rd ed., vol. I, p. 194, Storey on Agency, 9th ed. (1882), para. 217, and *Blaustein v. Maltz, Mitchell & Co.*⁵⁷

No useful purpose would be served by directing that the case should go on until after discovery. That course was followed in *The Sylvan Arrow*⁵⁸ because the vital issue could not be tried on affidavit evidence. But here the evidence is undisputed. Even if it is not accepted that Rahimtoola was an agent, but acted as a principal, it is plain that he accepted the fund on the condition that he was bound to act on the direction of Pakistan in relation to it, and that would be sufficient to give the State an interest which attracted immunity.

The nature of the relationship of the State to the fund raises two questions: first, what was the exact interest? and, secondly, was it "property" within Dicey's formula, or was it an illusory interest? It is clear that "property" rights in this sense are not confined to proprietary or even possessory rights: see Lord Wright's observations in *Compania Naviera Vascongado v. S.S. Cristina*.⁵⁹ In the *Dollfus Mieg* case⁶⁰ the Court of Appeal held

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⁵⁶ (1854) 18 Beav. 596.⁵⁸ [1923] P. 14.⁵⁷ [1937] 2 K.B. 142, 156; 53⁵⁹ [1938] A.C. 485, 507.

T.L.R. 397.

⁶⁰ [1952] A.C. 582.

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that a right of control was sufficient. That point did not have to be decided in the House of Lords. Sir Andrew Clark has sought to draw a distinction between a chose in action and a chattel where, he says, a bare right of occupation may suffice, but that is not the point here. There is no reason why one cannot have control of a chose in action. In the American case of *Bradford v. Chase National Bank of City of New York* ⁶¹ the court referred to "control" of a chose in action, and there is a similar suggestion in the Bankruptcy Act, 1914 ("reputed ownership," which seems to contemplate not only an owner but also a person having possession or sufficient control to order a disposition). In the *Haile Selassie* case ⁶² the Court of Appeal said that one could not have possession of a chose in action, but that was with particular reference to that claim and the circumstances here are quite different.

[ROMER L.J. *Colonial Bank v. Whinney* ⁶³ shows that it is possible to have control in some sense of a block of shares in the control of someone else.]

"Control" is not a word of art. There are two possible arguments as to the nature of the interest of the State of Pakistan in this chose in action. First, that the State has the actual property, and, secondly (on the assumption that Rahimtoola is an agent or servant in relation to the debt), that the State had the right to call upon him to transfer it and could maintain proceedings against him to enforce the direction if he resisted it. The nature of the remedy which the State would have to seek does not affect the position. In the *Dollfus Mieg* case ⁶⁴ the sovereign had the right to possession and that was sufficient to support the claim to immunity. In all the requisitioning cases, except *The Broadmayne*, ⁶⁵ the requisitioning decree was foreign and the courts held that, where the owners were acting under a requisitioning decree made by a foreign sovereign, the State in question had sufficient interest in the property to claim immunity. It was not relevant to inquire whether the particular decree was effective or not.

Whether the word "control" is used or not, the State had by virtue of its power to direct its servant and by the de facto acceptance by him of that power a sufficient proprietary interest in the subject-matter of the debt to attract immunity. The title

⁶¹ 24 Fed.Supp. 28.

⁶² [1938] Ch. 839, 847.

⁶³ (1885) 30 Ch.D. 261; 1 T.L.R. 636; reversed 11 App.Cas. 426; 2 T.L.R. 747.

⁶⁴ [1952] A.C. 582.

⁶⁵ [1916] P. 64; 32 T.L.R. 304.

of the State was not illusory in the sense in which it was in *Juan Ysmael & Co. Inc. v. Indonesian Republican Government*.⁶⁶

Sir Andrew Clark Q.C. in reply. It is not true on the facts that the State can call for the immediate transfer of the legal title from Rahimtoola. As High Commissioner of Pakistan Rahimtoola was, in that capacity, the agent of the State for some purposes, but it does not follow that he was the agent for the purpose of accepting the debt, even if it be shown that the debt was transferred to him because he was High Commissioner. If he were not the agent for that purpose, the State cannot call for the transfer of the legal title to the debt. The mere vesting of property or even trust funds in a person holding office under a corporation does not necessarily impose any obligation to the corporation even though the vesting was by virtue of the office: *Brunton v. Forrest*.⁶⁷ Moin asked Rahimtoola to accept, but Moin was acting without authority and could not bind the Nizam. The facts giving rise to sovereign immunity must be strictly proved by the claimant, and here the evidence as to what took place at the vital interview is very inadequate. Rahimtoola may have thought that he was acting as the agent of the State, but his belief is not conclusive. The State claiming immunity must prove strictly that it was in possession or control of the property which is the subject-matter of the action. If the property is in the possession of some third party, the sovereign must prove his title to it. The statement of principle in the *Haile Selassie* case⁶⁸ applies and binds the Court of Appeal.

Acceptance as High Commissioner is consistent with the conclusion that the fund was to be in the name of the High Commissioner and no one else. The onus is on the defendants to disprove that and they have not done so. If so, the State could not have called on Rahimtoola to transfer to them. Even if immediately after the transfer to Rahimtoola the State could have required him to transfer, they had lost that right by the time the writ was issued. If, however, it should be held that Rahimtoola did hold as agent for the State, no evidence has been given as to the terms of his agency, or, in other words, the scope of his authority as a matter of contract. If the terms were that Rahimtoola should receive and hold the fund to the order of the State, it is strange that the only two persons who could give evidence on this matter, Sir Zafrullah Khan and Rahimtoola, have not said so. It is possible, and a natural inference from

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⁶⁶ [1955] A.C. 72.⁶⁸ [1938] Ch. 839, 847.⁶⁷ (1849-50) 14 L.T.O.S. 121.

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the facts, that Rahimtoola was merely the agent to act as the trustee for the Nizam appointed by the Government of Pakistan. That was the only honest thing to do; anything else involves a breach of duty by Moin. In the absence of compelling evidence, the court should not assume that he acted dishonestly. If Rahimtoola was accountable to the Nizam, the State could not have required him to transfer the fund to it without the Nizam's authority.

It is well established that if an agent receives money from his principal he must account for it to his principal and repay it when called on to do so, regardless of any claim made by third parties, unless the agent has notice that the money is trust money and that to repay it to the principal would be a breach of trust, for no one can be compelled to be a party to a breach of trust: see Bowstead on Agency, 11th ed., p. 266, and Halsbury's Laws of England, 3rd ed., vol. I, p. 233. That is not the case here, for the money was not entrusted to the agent by the principal. If the agent receives money from a third party for the use of the principal, then also he is liable to account for it to the principal and to pay it over whenever he is called on to do so, except where the money is paid to him under a mistake of fact or in consequence of a wrongful act and repayment is demanded by the payor before the agent has actually paid it over to his principal. After that, he is bound to account to the payor and not any longer to his principal. That, also, is not this case, but it would have been if Rahimtoola had attempted to transfer the beneficial interest to the State, for two months before the writ was issued Rahimtoola had notice that the payment had been made pursuant to a wrongful act and repayment was demanded. Thereafter he could not be called on to account to the State. Consequently, when the writ was issued the State had no right to call for the legal title, for notice to the agent was notice to the principal. As from that date there was no nexus between the State and Rahimtoola in respect of the fund. Rahimtoola held the fund for the Nizam. It has not been said that he had the full authority of the Nizam to transfer, and the State has not sought to claim that it has any beneficial interest: see *Cox v. Prentice*⁶⁹ and *Cary v. Webster*.⁷⁰ A distinction is to be drawn in this respect between the agent of a State and the ambassador of that State. An ambassador might more easily be the emanation of the State. The High Commissioner is not in

⁶⁹ (1815) 3 M. & S. 344.⁷⁰ (1721) 1 Str. 480.

such a close relationship to the machinery of the State, and it has not been alleged that suing Rahimtoola was in effect suing the State.

Upjohn J. did not hold that the State had the legal title. What he meant was that, on the analogy of the *Dollfus Mieg* case,⁷¹ the State had the immediate right to get possession of the legal right and that that in the case of a chattel was equivalent to the legal title. A right to call for a transfer of a chose in action is not in any way analogous to the right to immediate possession of a chattel. Neither the decision nor the reasoning of the *Dollfus Mieg* case⁷¹ has any application to a debt. A mere right to call for a legal title is not such a right of property as could support a claim for sovereign immunity and would not make the debt "property" within Dicey's formula. "Control" has no meaning in relation to a chose in action. The control of a chattel is in the person who has it, and it is possible to have control of a chattel without having a title to it. [Reference was made to Bowstead on Agency, 11th ed., arts. 77 and 88.] An agent acquiring property for his principal is a trustee for the principal. The State might be liable to indemnify Rahimtoola for any loss suffered, because he had accepted the fund at the State's direction, but there was no nexus between the State and the Nizam. Whatever Moin thought is immaterial. The Nizam could not have sued Pakistan either in law or in equity.

If, however, at the date of the writ the State could have called on Rahimtoola for an immediate transfer of the debt, the legal title is in Rahimtoola and the State has only a personal right against him to require him to transfer the debt. That is a different right from that of a bailor to call on the bailee to deliver up property, for the bailee has actually got the property. The *Dollfus Mieg* case⁷¹ was the high-water mark of the immunity cases. The necessity of giving sovereign immunity is apparent in some cases, but where it is not necessary the courts have been more strict. It was necessary in the case of a bailor and a bailee, because the abstract government has to entrust goods to servants and agents, and it is reasonable that the government should be able to deposit goods with a bailee without losing sovereign immunity. There is, however, no good reason for extending immunity to a case such as this. It would have been simple to have opened a banking account in the name of the Government of Pakistan and that Government could have had possession of

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⁷¹ [1952] A.C. 582.

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the chose in action. If the fund had been put into the name of the State, the Nizam could not have sued, for that would have been direct impleading. The State would not have lost immunity by giving someone authority to draw on the account.

Finally there are the trust exceptions. It is not true that the State is the trustee. Rahimtoola is the trustee and the trust exceptions do apply. Rahimtoola is admittedly amenable to the jurisdiction of the courts. Even if the State had had the legal and beneficial rights to the fund, the trust exceptions show that proceedings could still have been taken against the trustee. The courts can adjudicate on the sovereign's beneficial title and can order the fund to be paid to the person entitled to it. A fortiori there can be no objection to adjudicating on the title, if the sovereign only claims the legal title. If the court is satisfied that there is a trust, the test to be applied is whether an order for administering the trust would involve making orders against the State which the court could not enforce. The State is not the trustee—put at its highest, the claim can only be that the State is the person entitled to appoint a new trustee, but it would be no bar to the administration of a trust estate that a person in that position had not been joined. The argument would have been the same even if the State had claimed the beneficial interest. In *Larivière v. Morgan*⁷² the trustee was acting as the agent for the foreign sovereign. [Reference was also made to *Duke of Brunswick v. King of Hanover*.⁷³]

MacKenna Q.C. Even after the notice of the Nizam's claim the State still had de facto control, because Rahimtoola recognized the State as being in control and no one else.

December 20. The following judgments were read.

LORD EVERSHERD M.R. The judgment I am about to read is the judgment of Birkett L.J. and myself.

Immediately before the events of September, 1948, presently related, the fund of £1,007,940 9s. (which is the subject-matter of the present action) was standing at the Westminster Bank Ltd., to an account in the name of the Government of Hyderabad. The persons entitled to draw upon the account were the first defendant (and we shall follow the judge in calling him "Moin") and the agent general for Hyderabad in London, Mir Jung

⁷² L.R. 7 Ch. 550 (reversed on the facts in the House of Lords (1875) L.R. 7 H.L. 423).

⁷³ 6 Beav. 1.

(whom we will call, as did the judge, "Mir"). The first defendant at that time was the Finance Minister in the Government of the Nizam in Hyderabad. The Nizam was then an absolute monarch in Hyderabad. There was no distinction, therefore, between moneys which were part of his private fortune and moneys which were, or represented, what we should regard as State funds. It does not, in fact, appear whether the fund in question belonged to one category or the other, nor is the distinction at all relevant to the present case. The Nizam had, in fact, as between himself on the one hand and Moin and Mir on the other, placed limitations upon their right to draw upon the fund. By a decree or firman which he had issued in the previous January the money was to be applied exclusively for the purchase of machinery. These limitations had, however, never been communicated to the bank, and they also, therefore, are irrelevant for present purposes.

On or about September 16, 1948, a meeting took place in London upon which a great deal of the argument in the present case has turned, and to which, therefore, we must later refer in detail. The effect of the meeting was that instructions were given in due form by Moin to the bank to transfer the fund in question into the name of the third defendant, Habib Ibrahim Rahimtoola, who then held the office of High Commissioner in London for the State of Pakistan. The transfer was effected by the bank on September 20, 1948, Rahimtoola ^{73a} supplying to the bank specimens of his signature. Thenceforward the position of the fund at the bank was, and it still is, that it stood and stands in the name of "Mr. Habib Ibrahim "Rahimtoola (High Commissioner for Pakistan in London)."

Within a matter of a few days after the transfer of the fund the Nizam sent a cable (later repeated) to the first defendant, Moin, requesting him to re-transfer the fund into the name of himself or of the Government of Hyderabad: and a like request was also on September 28, 1948, communicated by the Nizam to the bank. To the cables which he received Moin returned soft answers, assuring the Nizam that the fund was in safe hands, but also asking for specific written instructions which, in fact, were never despatched. It was stated in the course of his judgment by the judge (and, it may be, correctly, though there was no direct evidence to this effect in the papers before us) that

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^{73a} His Lordship would like it to be known that he referred to this defendant as "Mr. Rahimtoola" throughout his judgment.

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at this time the Armed Forces of India were in process of invading the State of Hyderabad.

In the month of February, 1952, the third defendant, Rahimtoola, ceased to be the High Commissioner in London for the State of Pakistan. The fund, however, remained in his name and no dealings with it have at any time taken place. On May 17, 1954, Messrs. Stanley Johnson & Allen wrote to Rahimtoola, on the instructions of the Nizam and on behalf of the Government and of the State of Hyderabad, informing him that Moin had, in fact, had no authority from the Nizam or his Government to effect the transfer in September, 1948, into Rahimtoola's name. "As Your Excellency is of course aware," continued the letter, "the funds transferred to the account "in Your Excellency's name . . . have at all times been and "still are the property of H.E.H. The Nizam and his Govern- "ment." The letter continued by informing Rahimtoola that the Nizam and his Government required the fund to be paid to them or to their order. Messrs. Stanley Johnson & Allen addressed on the following day a similar communication to the bank.

When the case was before the judge there was no direct evidence in support of the contention, referred to in the letter which we have quoted, that the transfer by Moin to the Westminster Bank had been without proper authority. Upjohn J. in his judgment said: "Nor in my judgment is it proved that "Moin or Mir acted in breach of their duty in ordering transfer "of the debt to Rahimtoola . . . No one has sworn that the "transfer was against the personal orders of the Nizam, but "only that no trace of any such order can be found." When Sir Andrew Clark was opening the appeal before us he asked leave to read an affidavit since sworn by the Nizam in order to fill the gap in the evidence which the judge had noted. As this was an interlocutory matter we thought it right to give leave to read the Nizam's affidavit sworn on November 6. In it the Nizam had stated without any equivocation that the transfer of the fund was without his knowledge or authority. "I say that at no "time did I give any direction or sanction or authority . . . to "the said Moin . . . or to any other person to transfer the said "sum of £1,007,940 9s. or any part thereof to the defendant "Rahimtoola or to the Pakistan Government or to any person "representing the Government of Pakistan." The Nizam then alluded to the cables later sent to Moin to which we have earlier referred. On the face of the evidence as it now stands, it must

in our judgment be taken as clear that the transfer was effected in breach of the duty of Mir and Moin to the Nizam and without any authority from the Nizam in fact.

We return to the important events which occurred on or about September 16, 1948. The first account was given by Rahimtoola in the affidavit which he swore on July 15, 1955, in support of his application to stay the present action. Paragraph 3 of that affidavit was in the following terms: "On or about "September 16, 1948, it was agreed between the said Nawab " (that is, Moin) "and myself that the said funds should be transferred to me as the agent of the Government of Pakistan and "by a letter dated September 16 the said Nawab instructed the "said bank to transfer the funds standing to the credit of the "said account to an account in my name. On receipt of such "letter on September 20, 1948, the said bank in accordance with "the instructions therein contained transferred the said funds "then amounting to £1,007,940 9s. to a new account in my "name. I accepted such transfer in accordance with the instructions of and as agent for my government and have never "claimed any personal interest in the funds so transferred."

It will be seen that Rahimtoola stated in clear terms that he accepted the transfer "with the instructions of and as agent "for my Government": and that such was the intention in making the transfer.

In answer to that evidence an affidavit was sworn by one Gupta, Secretary to the Public Works Department of the State of Hyderabad. Gupta stated that, as a result of his inquiries, the transfer had been, to the best of his knowledge and belief, without any authority on the part of the Nizam. He also referred to the cabled instructions to the bank of September 28, 1948, asking that the fund should be re-transferred to an account in the name of the Nizam's Government. Finally, he expressed his belief that the fund had been transferred to Rahimtoola and had been received by him as agent and trustee for the Nizam, rather than for the Government of Pakistan, and submitted that he (Rahimtoola) should amplify his first affidavit. This last request on Gupta's part met with a response by Rahimtoola, who swore on June 19, 1956, a further affidavit expanding the account given in paragraph 3 of the affidavit which we have already quoted. Thus he said: "The then Foreign "Minister of Pakistan Sir Mohammed Zafrullah Khan was "present at the interview between such representative and "myself and he instructed me to accept the transfer of the

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“ said funds. I objected on the ground that the Government
“ of Pakistan should not become involved but my objections
“ were overruled by the said Zafrullah Khan who directed me to
“ agree to the transfer of the said funds to an account in my name
“ but to be described as the High Commissioner for Pakistan
“ and also directed me to sign the necessary specimen signature
“ forms and I thereupon agreed to the transfer of the said funds
“ to the account which was subsequently opened in my name
“ and signed the forms. I would never have agreed to the said
“ transfer unless I had been expressly instructed to do so as the
“ High Commissioner of Pakistan and on behalf of my Govern-
“ ment by the said Zafrullah Khan under whose instructions I
“ was as High Commissioner bound to act.”

Paragraph 5 of this second affidavit and the first part of paragraph 6 were as follows: “ 5. It was never suggested to me
“ that I should accept the said funds on my own account as a
“ private individual as an agent or trustee for the Nizam but if
“ it had I should have refused to do so as I would have considered
“ it improper to act in such a way while holding the position of
“ High Commissioner since if I had not been acting on behalf
“ of my Government it would undoubtedly have been generally
“ supposed that I was. 6. At the time when the said transfer
“ of the said funds took place I knew nothing about them except
“ that Moin and the said Mir Nawaz Jung had the power to
“ give orders to the defendant bank in respect of such funds.
“ I did not know whether they were personal moneys of the
“ Nizam or State moneys or what if any orders Moin or the said
“ Mir Nawaz Jung had been given in relation thereto by the
“ Nizam or what if any formality was required for the transfer
“ thereof to me.”

Rahimtoola went on to state that he had no knowledge at all, and that it did not occur to him to inquire, as to the extent of the authority of Moin and Mir, and finally he said: “ After
“ accepting the said transfer I regarded myself as bound to deal
“ with the account in accordance with the instructions of my
“ Government and would have refused to deal with it in
“ accordance with any directions given by the Nizam.”

On this material it has been strongly contended by Mr. McKenna on Rahimtoola's behalf that the fund was transferred to Rahimtoola and held by him in no true sense as a third party but as the agent and servant for the purpose of the State of Pakistan—in other words, that the transfer was not made to him because he was the High Commissioner for his

country in England but in his capacity as such. It may be stated that this view of the matter was consistently maintained by Rahimtoola himself. In July, 1953, pursuant to instructions given to him earlier in the same month by the Secretary of his Government, he requested the bank in writing to transfer the account into the name of his successor, Mr. Ispahani, observing that he held the fund "not in my personal capacity but as agent of my Government." In the same sense was the letter written a year later by Rahimtoola's solicitors to the bank objecting to the latter's compliance with the plaintiffs' request (contained in the letter of May 17 already mentioned) for a re-transfer of the fund. Rahimtoola "was concerned," said the letter, "solely as agent for the Government of Pakistan" of which he was High Commissioner in the United Kingdom at the relevant time and on whose behalf the moneys were originally transferred to him. To the same effect again was the letter addressed by Ikramullah, the present High Commissioner in London for Pakistan, to Rahimtoola's solicitors dated July 8, 1955, instructing them to "bring to the attention of the court the fact that my Government claims to be entitled to the said sum."

It will be convenient at this point to refer briefly to the remaining chronology in the case. The writ in the action was issued in July, 1954, and the statement of claim is dated in the following November. The nature of the plaintiffs' alleged cause of action against Rahimtoola is for a return of the money as held by him on trust for the plaintiffs or alternatively as money due and owing to the plaintiffs or alternatively, again, as money had and received to the use of the plaintiffs. The bank put in its defence in December, 1954. Leave was given in the following January to serve out of the jurisdiction the first and third defendants, namely, Moin and Rahimtoola. The first defendant has entered no appearance to the action. Rahimtoola's motion to stay the proceedings, on the ground that they impleaded the Sovereign State of Pakistan, is dated July 19, 1955, and that application was decided favourably to Rahimtoola by Upjohn J. on July 30, 1956.

When the matter was before Upjohn J. it was alleged on the part of Rahimtoola that the plaintiffs had failed to make proper disclosure of the material facts when seeking leave to serve out of the jurisdiction. Upjohn J. expressed himself as satisfied that the failure in this regard on the plaintiffs' part was in no sense due to any intention to mislead the court. The matter is only now relevant upon the question of costs if we take

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a different view from that of the judge upon the main question in the appeal.

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It appears that since the matter was before Upjohn J. the State of Hyderabad has altogether ceased to exist. Before its demise, the State duly assigned to the first plaintiff, the Nizam, all its rights and title to the fund and in the present action.

In this state of facts Sir Andrew Clark, in opening his case before us for the Nizam, said two things. First, he submitted that for the purposes of the present application and the attempt by Rahimtoola to invoke the rule of sovereign immunity, Rahimtoola must be regarded as a third party, altogether distinct from the State of Pakistan, whose High Commissioner in London he happened to be in 1948. Under this head of his argument Sir Andrew emphasized: (1) That Rahimtoola was not as High Commissioner at the relevant date entitled to personal immunity; (2) that the office of High Commissioner was for the purpose in hand quite different from that of one of the principal Ministers of the State of Pakistan, which might well have so identified its holder with the State itself as to have a vesting of the fund in such a holder equivalent in all relevant respects to a vesting in the State itself or in its whole Government as such; (3) that the State of Pakistan must be taken never to have had any beneficial interest whatever in the fund, which belonged at all times in equity wholly to the Nizam; and (4) that the present case, being concerned with a chose in action, in regard to which *title* only could be relevant, was essentially distinct from that of *United States of America and Republic of France v. Dollfus Mieg et Cie S.A.*,¹ where the subject-matter was chattels, namely, gold bars, deposited with the Bank of England by the foreign sovereign States, who were held by the House of Lords to be entitled as bailors to an immediate right to their possession and who were not, accordingly, required to prove or even allege any title to them.

Sir Andrew submitted, secondly, that, even if the State of Pakistan could be shown to have any right or interest in the chose in action, they held such right or interest in the capacity of a trustee only; and that the rule of sovereign immunity would not be recognized by the English court exercising its equitable jurisdiction in regard to trust property, even where the foreign sovereign was the trustee and declined to submit to the court's jurisdiction.

¹ [1952] A.C. 582; [1952] 1 T.L.R. 541; [1952] 1 All E.R. 572.

The answer to these contentions of Mr. MacKenna and Mr. Wilberforce on behalf of Rahimtoola—and they informed us that they were also instructed by the State of Pakistan—may be shortly stated. They submitted that since upon the evidence it must be taken as proved for present purposes (as the judge held) that Rahimtoola took the transfer of the fund as the agent of the Government (or State) of Pakistan, the latter were therefore entitled, according to the ordinary law of principal and agent, to call upon Rahimtoola at any time to deal with the fund as they should direct and (particularly) to transfer it to themselves. On this view, the question of beneficial interest was wholly irrelevant. On the other hand, there was (they said) a true analogy with the *Dollfus Mieg* case,¹ since the sovereign State of Pakistan had at all times the complete control, or the right to complete control, at law of the fund itself as distinct from any beneficial or proprietary interests therein. They said further that the independence of the Chancery Courts in regard to trust property, as shown by the decisions, has never extended to a case in which the trustee was a foreign sovereign and should not be so extended—nor could it be, without impinging upon the status and dignity of the sovereign to a degree wholly inconsistent with the principle of the rule itself.

It must be said at once that the situation in this matter of the State of Pakistan has remained somewhat obscure. According to Ikramullah's letter of July, 1955, from which we have quoted, the State (or its Government) claimed to be entitled to the fund, and the same claim was made in his affidavit by one Chambers, a member of the firm of solicitors now acting for Rahimtoola. In answer to questions which were put to him and which reflected similar inquiries made by Upjohn J., Mr. MacKenna informed us that he was instructed not to abate any of those claims. But Mr. MacKenna conceded that there was no evidence at all before the court of any beneficial interest in the fund vested in the State of Pakistan (or its Government), and we also understood him to concede that his claim of sovereign immunity was not founded upon the subsistence of any beneficial interest in the sovereign; and, beyond a peradventure, Rahimtoola has altogether disclaimed such an interest in himself. But it has throughout been the contention of Mr. MacKenna and Mr. Wilberforce that this question of beneficial interest was irrelevant to the appeal. The right they have asserted on behalf of the sovereign is a right of control analogous (as they say) to

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that successfully invoked in the *Dollfus Mieg* case²; and they drew particular attention to the disavowal by Sir Hartley Shawcross and Mr. Buckley in that case of any proprietary claim on behalf of the foreign sovereign.²

It will therefore be convenient for us to make at this stage our references to the *Dollfus Mieg* case.³ It may be said that all the earlier cases on the subject were in *Dollfus Mieg*³ cited to, and considered by, the House—particularly the speeches of Lord Atkin and Lord Maugham in *Compania Naviera Vascongado v. S.S. Cristina*.⁴ We shall content ourselves with one substantial citation from the opinion of Lord Radcliffe⁵: “For myself I think that the range and purpose of our rule is expressed as well as may be in Dicey’s *Conflict of Laws*, 6th ed., p. 131: “The court has . . . no jurisdiction to entertain an action or “proceeding against (1) any foreign sovereign . . . Any action “or proceeding against the property of (a foreign sovereign) is “an action or proceeding against such person.” This is the rule “which Scrutton L.J. quoted with approval in *The Jupiter*.⁶ “The rule so expressed leaves open the question what is an “action ‘against the property of a foreign sovereign’ in any “particular case. But I am afraid that the abundant argument “that we had in this case as to the application of the “words ‘of which he is in possession or control,’ as used by “Lord Atkin, shows that even his summary leaves open as many “questions as it settles. In fact this is not a field in which “the law can be set at rest by any neat combination of words. “But the rule as expressed in Dicey has this advantage: it does “make clear that the property of a sovereign enjoys no immunity “in legal proceedings except so far as those proceedings amount “in one way or another to a suit against the sovereign. If the “sovereign is actually named as a party to a suit the proceedings “identify themselves. Even then I think that it is going too “far to say that such a suit must necessarily be arrested. It “may depend on the purpose for which the sovereign is made a “party. But certainly a special difficulty begins when he is not “actually named but the suit is one which may result in a “judgment or order that will affect his interest in some piece of “property. Even to say that much begs one important question, “for it assumes that he has a valid interest in that property:

² [1952] A.C. 582, 584.³ [1952] A.C. 582.⁴ [1938] A.C. 485; 54 T.L.R. 512;

[1938] 1 All E.R. 719.

⁵ [1952] A.C. 582, 615 et seq.⁶ [1924] P. 236; 40 T.L.R. 815.

“ whereas a stay of proceedings on the ground of immunity has
 “ normally to be granted or refused at a stage in the action when
 “ interests are claimed but not established, and indeed to require
 “ him to establish his interest before the court (which may
 “ involve the court’s denial of his claim) is to do the very thing
 “ which the general principle requires that our courts should
 “ not do. *The Parlement Belge* ⁷ is a leading case on this branch
 “ of the law, but it does not offer much help on the particular
 “ aspect of it with which your Lordships are now concerned
 “ because it was common ground throughout the case that the
 “ ship was the public property of the Kingdom of Belgium.
 “ What the plaintiffs objected to in that case was the staying
 “ of an action in rem about the ship having regard to the uses
 “ that she was put to by her sovereign owner. Once it was
 “ settled that those uses did not disqualify the owner from
 “ taking advantage of the general rule, it was easy to show that
 “ the court’s order for the arrest of the ship, if made, would be
 “ in substance an order against the sovereign. But the principle
 “ recognized in *The Parlement Belge* ⁷ has been carried much
 “ further since then. It has been applied even when the
 “ sovereign had not claimed, let alone proved, that he was the
 “ owner of the property that was the subject of the action. It
 “ has been regarded as sufficient to stay the proceedings (1) that
 “ he had de facto possession of the property (*The Gagara*,⁸ *The*
 “ *Jupiter*,⁹ *The Cristina* ¹⁰), or such rights of direction and control,
 “ without possession, as arise from requisitioning (*The Broad-*
 “ *mayne* ¹¹), and (2) that the nature of the proceedings is such
 “ that, if successful, they would result in an order of the court
 “ affecting that possession of those other rights. *The Cristina* ¹²
 “ is, of course, a decision of this House: in it, the other decisions
 “ that I have referred to, all unanimous decisions of Courts of
 “ Appeal, were reviewed and, as I think, approved: in my
 “ opinion they constitute a principle wide enough in application
 “ to be conclusive of the present appeal.”

From this passage it sufficiently appears, in our judgment, that the prohibition, which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign State which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which

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⁷ (1880) 5 P.D. 197.⁸ [1919] P. 95; 35 T.L.R. 259.⁹ [1924] P. 236; 40 T.L.R. 815.¹⁰ [1938] A.C. 485.¹¹ [1916] P. 64; 32 T.L.R. 304.¹² [1938] A.C. 485.

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the sovereign is not made or sought to be made a party, but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends upon the extent to which the prosecution of the claim so affects the right or interest of the sovereign "as to amount in one way or another to a suit "against the sovereign." The proposition is imprecise, no doubt; but as Lord Radcliffe observed, the law cannot be set at rest "by any neat combination of words."

In the *Dollfus Mieg* case¹³ the rule was held to be applicable because, notwithstanding the admitted absence of title in the sovereigns and its admitted presence in Dollfus Mieg et Cie, the sovereigns as bailors of the bars with the bank had vis-à-vis the bank an immediate right to recover their possession with which, inevitably, the continuance of the action would interfere; so that, if the sovereigns desired to recover the possession which they formerly had, they would be compelled to come to the English court for the purpose. (See *per* Earl Jowitt¹⁴, *per* Lord Porter,¹⁵ *per* Lord Radcliffe.¹⁶)

The present proceeding relates, not to chattels but to a chose in action. It is, therefore, upon matters of essential fact distinct from the *Dollfus Mieg* case.¹⁷ For where the subject-matter of the proceedings is a chose in action there can be no question, strictly, of possession. *Prima facie*, any rights or interests in respect of it must be matters of title. So much has been laid down for us by this court in *Haile Selassie v. Cable & Wireless Ltd.*¹⁸ The judgment of the court in that case must clearly be preferred, in our view, to the suggestion in the judgment at first instance in the American case of *Bradford v. Chase National Bank*¹⁹ that there might be "possession" (in the true significance of that term) of a chose in action. And if the question depend upon some claim of title on the part of the sovereign, then it cannot, in our judgment, suffice that the sovereign has at some time asserted a title to the fund if, when the rule is invoked, there appears no evidence at all in support of such claim—more particularly if it is conceded on behalf of the sovereign's representative that the claim to immunity is not founded upon any title or proprietary interest. (See, for example, *Juan Ysmal & Co. Inc. v. Indonesian Republican Government*.²⁰)

¹³ [1952] A.C. 582.

¹⁴ *Ibid.* 604, 605, 607.

¹⁵ *Ibid.* 612, 613.

¹⁶ *Ibid.* 619.

¹⁷ [1952] A.C. 582.

¹⁸ [1938] Ch. 839; 54 T.L.R. 996;

[1938] 3 All E.R. 384.

¹⁹ (1938) 24 Fed.Supp. 28.

²⁰ [1955] A.C. 72; [1954] 3 All E.R. 236.

So far, then, Sir Andrew's first submission would appear to have persuasive force. For if it be said by A that a chose in action is vested in B as agent for and on behalf of himself, A, then it would ordinarily be understood that A claimed to be the beneficial owner. But for the purpose of considering the application of the rule of sovereign immunity, as we have tried to express it by reference to Lord Radcliffe's opinion, we are not satisfied that the dichotomy between possession and title is necessarily exhaustive, or that it may not be relevant to consider the conception of "control" (a word appearing in Lord Atkin's well-known statement in *The Cristina*²¹ to which Lord Jowitt referred in the *Dollfus Mieg* case²² in relation to a chose in action). For if the sovereign be shown in some sense to have "control" of the debt, then the question arises whether, if continuance of the proceedings interfere with that "control," the court will not in substance be asserting jurisdiction over the sovereign himself. It is true that Sir Wilfrid Greene M.R. in the *Haile Selassie* case²³ used the phrase "In the case of a debt such as that with which we are concerned there can be no question of possession or control." But the circumstances of the debt with which the court was there concerned did not raise at all the point here raised, namely, that the State of Pakistan had an unfettered right to require Rahimtoola, in whom the debt was vested as their agent, to deal with it in all respects as they required. In that sense (if such right existed at the relevant date) the State may sensibly be said to have a "control," interference with which would at least compel the State (if they decided to exercise it) to come to the English court. However the "control" is defined in terms of the law, it might certainly qualify as one of those interests "lesser than a proprietary interest and even than a possessory interest" which Lord Jowitt thought were not to be confined to ships.

It was on this point that Upjohn J. rejected Sir Andrew's first argument, being of opinion that the State of Pakistan was²⁴ "in effect clothed with the legal title to the debt." The conclusion depended upon the judge's view of the facts in evidence before him, namely, that the transfer of the debt to Rahimtoola was a transfer to him in his capacity as High Commissioner and as a mere servant or agent of the sovereign State. It is for this reason that the argument before us turned so much upon the

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²¹ [1938] A.C. 485.²³ [1938] Ch. 839, 847.²² [1952] A.C. 582, 604.²⁴ Ante, p. 209.

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proper inference to be drawn from the affidavits of Rahimtoola relating to the meeting on or about September 16, 1948.

But before we leave the *Dollfus Mieg* case²⁵ in order to return to that evidence, there was one other point made by Mr. McKenna on the speeches of Lord Jowitt and Lord Porter upon which we should like to make one observation. We refer to the passage where Earl Jowitt cites²⁶ and approves language used by Jenkins J. when the case came before him at first instance, and to the language of Lord Porter²⁷: "it has always to be "remembered that governments must act through servants or "agents . . ." These passages were invoked in support of the view that the vesting of the fund in an officer or representative of the State of Pakistan should, *prima facie* at least, be assumed to be necessarily equivalent to a vesting in the State itself. We cannot accept this argument. No doubt in a case of chattels a sovereign State, as distinct from a personal sovereign, must act through individual agents. But in the case of a chose in action it is not so. Of course, individual persons must execute any direction for dealing with the fund. But there would be or have been no difficulty (if such had been the wish of those concerned) in vesting the chose in action itself in the State (or Government) of Pakistan, *eo nomine*, giving to Rahimtoola the necessary authority to operate the fund on behalf of the State (or Government). After all, prior to the transfer, the fund stood in the name of "the Government of Hyderabad," Mir and Moin having the right of operation on that Government's behalf.

Nonetheless the evidence in favour of the conclusion of agency, which we have set forth at length earlier in this judgment, is of a formidable character. In his first affidavit Rahimtoola stated in terms that he took the transfer as his Government's agent. In his expanded account of the meeting Rahimtoola explained his original objection to taking the transfer on the ground that he thought it wrong that Pakistan should be involved in the matter; but that his objection was overruled by his Foreign Minister under whose express and compelling directions he took the transfer, not (as he said) having any real knowledge of the beneficial ownership of the fund and regarding himself as being bound accordingly to deal with it as ordered from time to time by his Government. Rahimtoola was, after all, the High Commissioner for Pakistan in London and was so described in the

²⁵ [1952] A.C. 582.

²⁷ *Ibid.* 612.

²⁶ *Ibid.* 606.

bank's books. Moreover, no attempt was made to cross-examine him.

Formidable though the effect of the evidence be, we still think that there is force in Sir Andrew's argument the other way. It is a truism that men may make a bargain, clear enough in terms, without any proper appreciation of its inevitable legal consequences. But we find it, for our part, not easy to suppose that those who took part in the meeting in September, 1948, could have contemplated that, on the very next day, the State (or Government) of Pakistan could have required a transfer of the fund into their own name and thenceforward have arranged, without further reference to the Nizam or any of his representatives, that the fund should be operated by persons of their own choice and nomination. No doubt Rahimtoola was chosen because, as High Commissioner for his country, he was regarded as a person in whom complete trust could be placed. It may well be, also, that the Nizam's representative felt able to rely on the Government of Pakistan and their relations with their own High Commissioner as providing additional security for the fund. It appears that Rahimtoola was regarded as personally well disposed to the Nizam. We note that, according to a letter dated as early as April 4 exhibited to Gupta's affidavit, it was even at that time suggested that the name of Rahimtoola should be added to those of Moin and Mir as the persons authorized to operate the account when it stood in the name of the Government of Hyderabad.

In all the circumstances it seems to us that there is at least much to be said for the view that the real purpose and intention of the transaction of September, 1948, were that the fund should stand in the name of Rahimtoola because he was High Commissioner for Pakistan and so long at least as he held that office; but without his being, in the eye of the law, the mere agent of his Government or State: and that such might upon a full investigation of the facts turn out to be the proper conclusion without thereby involving any real inconsistency with Rahimtoola's testimony or impeaching in any way his acknowledged good faith or veracity. But whether or not Rahimtoola took, and was intended to take, the transfer as agent for the State (or Government) of Pakistan, the transfer to him in, or by virtue of, his office as High Commissioner cannot be treated, in our judgment, as a transfer to one of the principal officers of the State which would so identify its holder with the State itself

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as to have made the vesting equivalent for all relevant purposes to a vesting in the State.

Having regard to the view which we have formed upon a further point taken by Sir Andrew in his reply, it is not necessary for us to express a final conclusion upon the question whether Rahimtoola should be regarded as a mere agent, and we prefer for ourselves not to do so. Sir Andrew's further point is a statement of an exception to the general rule that one who holds money or funds as agent for another is accountable only to his principal. The exception arises when, before the agent has in fact accounted to his principal or otherwise altered his position to the same effect, it appears that the payment or transfer was made to the agent under a mistake of fact or in consequence of some wrongful act. It is expressed substantially in the form which we have used in *Bowstead on Agency*, 11th ed., p. 266, and in *Halsbury's Laws of England*, 3rd ed., vol. 1, p. 233. Its first appearance in the books seems to have been in the year 1777 in *Buller v. Harrison*.²⁸ In that case insurers had paid insurance moneys to the agent of the assured believing that the loss had been "fair." When they discovered, before the agent had remitted the moneys to his principals, that the loss had in fact been "foul," they claimed to recover from the agent. "Now the law is clear," said Lord Mansfield C.J.,²⁹ "that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal; . . . Is it conscientious then, that a defendant should keep money which he has got by [his principals'] misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it?" Lord Mansfield C.J. had no difficulty in answering his question in the negative. His decision was followed by Lord Ellenborough C.J. in the case of *Cox v. Prentice*,³⁰ to which Sir Andrew referred us, and its principle has since been approved in this court by Sir Wilfrid Greene M.R. in *Gowers v. Lloyds and National Provincial Foreign Bank*,³¹ and in the House of Lords in *Kleinwort, Sons & Co. v. Dunlop Rubber Co.*³² by Lord Atkinson.

Lord Mansfield C.J. in terms referred to mistake. But the principle, at any rate, applies, in our judgment, as it is stated to

²⁸ (1777) 2 Cowp. 565.

²⁹ *Ibid.* 568.

³⁰ (1815) 3 M. & S. 344.

³¹ [1938] 1 All E.R. 766, 773; 54 T.L.R. 550.

³² (1907) 97 L.T. 263, 265; 23 T.L.R. 696.

do in the textbooks to which we have referred, whenever the circumstances are such that he who has paid the money might have recovered it from the agent's principal, whether on the ground of mistake of fact, or on the ground stated in the textbooks "on account of some wrongful act"—or, indeed, for any other valid reason. Thus, in *Buller v. Harrison*³³ itself, the payment by the insurers had been obtained by the principals' misrepresentation. In *Holland v. Russell*³⁴ underwriters had paid a shipowner's agent, himself innocent, under a policy which they could have repudiated on the ground of failure by the agent's principals to disclose that the ship insured was already damaged, but it was held that they could not recover from the agent, since he had paid over the moneys to his principal. In *Ex parte Bird*³⁵ (in which case *Buller v. Harrison*³⁶ was referred to in the course of argument) payment had been made by bankers in respect of forged acceptances, their claim against the acceptor's innocent agent failing because, on the evidence, the agent appeared already to have accounted to his principal.

Let it be assumed in the present case that the effect of the transfer of the fund into Rahimtoola's name in September, 1948, was not indeed equivalent to a transfer to the Government (or State) of Pakistan but, nevertheless, was, in the light of his evidence (that is, that the transfer was made to him as agent for his Government; and that he had no knowledge of the true beneficial ownership of the fund and no reason to suppose the existence of any limits on Moin's or Mir's authority to deal with the fund), to make him accountable only to his principal, the Government (or State) of Pakistan. In May, 1954, he received the plainest intimation from the Nizam's solicitors that the fund had belonged in equity to the Nizam personally and that the transfer in September, 1948, had been without the Nizam's authority and in breach of his agents' duty—and, if it be necessary, it is not suggested that the intimation was not received also by the Government or State of Pakistan. The allegations in Messrs. Stanley Johnson & Allen's letter have since been incorporated into the sworn evidence of the Nizam himself. In the light of these circumstances, Sir Andrew, in our judgment, makes good his point that, whatever was the earlier situation, at any rate from the date of the receipt of Messrs. Stanley Johnson & Allen's letter, the State of Pakistan could no longer—and certainly cannot at the present time—claim to have the

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³³ 2 Cowp. 565.³⁵ (1851) 4 De G. & S. 273.³⁴ (1861) 1 B. & S. 424.³⁶ 2 Cowp. 565.

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“control,” the right to command future dealings with the fund, as against the Nizam, in the absence of any claim of title on their part. On the evidence now before the court, the transfer to Rahimtoola is shown to have been a wrongful act on the part of the Nizam’s agents. Alternatively, and even if Moin and Mir supposed that they were acting within their authority (as Rahimtoola also supposed), this is now shown to have been a mistake. The same result is also, in our view, reached by another route. As a result of the letter of May, 1954, Rahimtoola (and his alleged principal) received clear notice, since confirmed by the Nizam’s sworn testimony, that the fund belonged in equity wholly to the Nizam and that his agents had no power to give that interest away; so that the person in whose name the legal interest stood held it on a resulting trust for the beneficial owner who has intervened, by assertion of his equitable right, before the agent has accounted to his principal. In any case, as it seems to us, the alleged principals not establishing in themselves, in Upjohn J.’s words, “a scintilla of title,” Rahimtoola now stands in truth as a third party, wholly distinct from the Government or State of Pakistan.

The point upon which, in our view, the Nizam is entitled to succeed before us was not put to, or considered by, the judge, who did not have before him the Nizam’s affidavit. Had he had the benefit of that argument and had he had that evidence, we think that he might well have decided the case otherwise than he did. For he observed that the result at which he arrived seemed to involve a wrong against the equitable owner. It is relevant to add that Lord Maugham’s warning in *The Cristina* case³⁷ that the doctrine of sovereign immunity should be carefully watched was in no way dissented from in *Dollfus Mieg*.³⁸ (See, for example, *per* Earl Jowitt³⁹ and *per* Lord Porter.⁴⁰)

Mr. McKenna’s answer to the point was that the question whether or no there had been any mistake, any wrongful act on the part of the Nizam’s agents, was one that would ordinarily have to be determined at the trial; and that it was the trial to which the sovereign State declined to submit. He referred again to Chambers’s affidavit and his assertion there of the claim made by the State of Pakistan; he alleged further that the State still retained *de facto* the control of the fund and pointed to the fact that, notwithstanding what had been said by the Nizam and on his behalf, Rahimtoola had refused to comply with the

³⁷ [1938] A.C. 485.

³⁹ *Ibid.* 607.

³⁸ [1952] A.C. 582.

⁴⁰ *Ibid.* 612.

Nizam's requests. In our judgment these answers do not suffice. If there were in truth a question of title to be determined the matter might be otherwise. But, on the evidence as it stands, the statements of the Nizam and made on his behalf in regard to beneficial ownership and breach of duty by his agents are uncontradicted; and the State and Government of Pakistan have shown no "scintilla of title" of any kind. If Rahimtoola declined to comply with the Nizam's demands, it seems, as matters now stand, that he was not entitled so to do. On the other hand, he would now appear certainly not bound or entitled to obey the orders in regard to the fund of the State or Government of Pakistan: and we observe that the bank felt itself, after the correspondence of May, 1954, unable to accept the direction for transfer of the fund into the name of Rahimtoola's successor, as it had indeed felt after the Nizam's communication of September, 1948.

Having reached this conclusion upon the point taken by Sir Andrew in reply, it is in strictness unnecessary for us to express our view upon his second point in opening the appeal, namely, that, whatever the right or interest of the State of Pakistan, they hold as bare trustees merely and that the court will not be deterred from exercising its equitable jurisdiction to administer trust property, even though the trustee is a foreign sovereign unwilling to submit to the jurisdiction. But since the question was fully argued and since the present case may go further, we think it right to say that upon it our conclusion coincides with that of the judge. As Lord Radcliffe observed, the practice of the Chancery courts, as shown by the decided cases, stands somewhat by itself. But the only judicial authority for the view that the court will exercise its equitable jurisdiction against a foreign sovereign who is a trustee appears to be that contained in the judgment of Lord Langdale M.R. in the case of *Duke of Brunswick v. King of Hanover*.⁴¹ The passage in the judgment relied upon is that where the Master of the Rolls said: "So where
" a defendant in this country is called upon to account for some
" matter in respect of which he has acted as agent for a foreign
" sovereign, the suit would not be perfect as to parties, unless
" the foreign sovereign were formally a defendant, and by making
" him a party, an opportunity is afforded him of defending him-
" self, instead of leaving the defence to his agent, and he may
" come in if he pleases; in such a case, if he refuses to come in,
" he may perhaps be held bound by the decision against his

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⁴¹ (1844) 6 Beav. 1, 39.

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“agent.” Lord Langdale M.R.’s statement, qualified as it is in any case by the word “perhaps,” was, at best, obiter: for, in the case before him, he allowed the general demurrer to the Duke of Brunswick’s bill on the part of the King of Hanover, who was also and for some purpose a British subject. Nor, in our judgment, can Sir Andrew obtain support for his proposition from the case of *Gladstone v. Musurus Bey*,⁴² in which an interim injunction was granted against the Bank of England. The language of James L.J., on the other hand, which Upjohn J. cited—and which we do not repeat—from the case of *Strousberg v. Republic of Costa Rica*,⁴³ seems to us to be against Sir Andrew’s proposition. The statement of the Lord Justice assumes that the trust property is “in the hands of a third party” or trustee, over whom this court has jurisdiction.”

We were referred to Professor Hamson’s note in the British Year Book of International Law, vol. 27 (1950), pp. 293, 298, of the case before the French Cour de Cassation of *L’Affaire Vestwig*. In that case the Supreme French Court appears to have rejected a claim to immunity on the part of the Norwegian State on the ground that the Norwegian Government, in which the relevant account had stood, was clearly shown to be in the position of a “mandataire” only; and the learned commentator suggested that the decision would be in accordance with the law as adopted by the English courts. We are not satisfied that, assuming the position of a “mandataire” to be equivalent to that of bare trustee under our law, our courts would follow the view of the French courts, at least as a general proposition: and the case of *The Jupiter* (No. 3),⁴⁴ cited by Professor Hamson, may fairly be said not to support in fact the contrary view.

If it be right that the English courts will in general administer trust funds held by a foreign sovereign, then it would appear to follow that the court would be prepared to make orders for an account and the like against the sovereign in order to make the jurisdiction effective. We cannot think that this is so. The making of such orders and the penal consequences which ordinarily attach to their neglect would appear to be in direct conflict with the English courts’ duty to respect the status and dignity of the foreign sovereign which, as we understand it, is at the root of the rule itself.

We add in conclusion a word as to the position of the bank. Mr. Cross, on the bank’s behalf, supported upon the main

⁴² (1862) 1 H. & M. 495.

⁴³ (1880) 44 L.T. 199, 201.

⁴⁴ [1927] P. 122, 250; 43 T.L.R. 210, 741.

question the argument of Sir Andrew Clark; but he further submitted that (as the judge decided) if the case for a stay were made good by Rahimtoola, then the bank also should be entitled to the benefit of the stay. The bank is, after all, in the position of a debtor and, as such, desires (naturally enough) that it should be determined to whom the money properly belongs, and should, if demanded, be paid. But if the proceedings were stayed against Rahimtoola but allowed to proceed against the bank alone, then the latter would be exposed to a real risk of being twice vexed in respect of the same claim. Having regard to the view which we have formed, it is unnecessary for us to express any view upon this point; and we do not do so. We think, for the reasons which we have given, that upon the facts now before the court Rahimtoola fails to make good a case for a stay of proceedings at this stage. In our judgment, the appeal should be allowed.

ROMER L.J. The point which I propose first to consider is one which was much canvassed in argument before us, namely, as to the capacity in which the defendant Rahimtoola was acting when he agreed on September 16, 1948, to accept a transfer of the funds which were then standing to the credit of the Government of the Nizam of Hyderabad at the Westminster Bank Ltd. The question is of obvious importance in relation to the case as a whole. Three different views of the matter seem to be possible: (1) That he was acting as a private individual; (2) that he was acting as agent for Pakistan; and (3) that he was acting as the organ or alter ego of Pakistan.

There were only three persons present at the interview at which the transfer was agreed upon, namely, the defendant Moin Jung, Rahimtoola and Sir Zafrullah Khan, who was at that time the Foreign Minister of Pakistan. Of these three gentlemen only Rahimtoola has given evidence upon this application. [His Lordship read extracts from Rahimtoola's affidavits and continued:]

Gupta, who was Secretary to the Public Works Department of Hyderabad State, swore an affidavit in which he expressed a certain scepticism with regard to Rahimtoola's evidence, but as Rahimtoola was not cross-examined on his affidavits, and there is no contrary evidence, his account of the events of September 16, 1948, must be accepted on this application as true. That being so, the plaintiffs contend that the proper inference to be drawn is that Moin Jung approached Rahimtoola as a private individual and that the only relevance of his office of High Commissioner for

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Pakistan was that it showed him to be a man of position and integrity and therefore, in the eyes of Moin Jung, a fit custodian of the fund which was to be committed to his control. I cannot, for myself, accept this view of the matter, for it is quite inconsistent with Rahimtoola's statement, unequivocally sworn to more than once in his affidavits, that he accepted the transfer by the direction of his superior, Sir Zafrullah Khan. It is obvious that he wished to have nothing to do with the matter, and had he been acting in his private capacity, he could, and would have, rejected Moin Jung's suggestion; and the fact that he regarded himself as subject to Sir Zafrullah's orders in the matter demonstrates, as I think, beyond any real doubt that he accepted the transfer in an official capacity and as the servant or agent of Pakistan. It is to be noted, further, that in July, 1953, Rahimtoola received from the Pakistan Government instructions with regard to the fund which he endeavoured, though unsuccessfully, to carry into effect; and this confirms that his nomination to the account was not private but official. I therefore cannot accept the contention of the plaintiffs that Rahimtoola took control of the fund in 1948 as a private individual. On the other hand there is, in my opinion, no sufficient evidence that he took it, or purported to take it, as the representative of Pakistan in the sense that he ought properly to be regarded as the alter ego of the State. It is obvious that it is not every servant or agent of a sovereign State that can be regarded as the equivalent of the State itself. It appears to me that the question must in general be one of evidence, and no evidence was adduced by the defendants or by Pakistan to show that it was the State itself which was accepting the transfer of the fund through the person of its High Commissioner; nor, in my opinion, does the fact that Rahimtoola held that office give rise to any *prima facie* presumption that such was the case.

In my judgment, accordingly, such interest as became vested in Rahimtoola in relation to the fund was taken by him as the servant or agent of Pakistan and not in his personal capacity or as a manifestation of the State. Of what, then, did that interest consist? It is quite clear on the evidence that Moin Jung had no beneficial interest in the money and could not therefore transmit one. Rahimtoola says in his second affidavit that he did not know whether the fund was the personal money of the Nizam or State money, from which the inference is that he knew it to be either the one or the other. In any case Rahimtoola claims no beneficial interest in the fund and never

has done. Suggestions were put forward in July, 1954, and again in July, 1955, on behalf of the Government of Pakistan, to the effect that they claimed to be beneficially entitled to the fund, but as no attempt has been made to substantiate the claim, and it forms no part of the defendants' case on this motion, it should, in my judgment, be disregarded for present purposes; on the material now before us the claim seems, in any case, to be a somewhat improbable one. On the footing, then, that no beneficial interest in the fund passed to Rahimtoola or to Pakistan when it was transferred to Rahimtoola's control, such interest, as a matter of legal consequence, remained after September 16, 1948, where it had been before, namely, in the plaintiffs; and there is nothing to suggest that this legal result was contrary to the intention of any of the parties concerned.

The position, therefore, after the new account was opened in Rahimtoola's name would appear to be as follows: (a) The legal title to the credit balance on the account was vested in Rahimtoola; (b) as he took such title as the servant or agent of Pakistan that State had the right to control Rahimtoola in the disposition of the legal title and to call upon him to transfer it to the State or as it should direct; and (c) the entire beneficial interest in the fund remained in the plaintiffs under and by virtue of a resulting trust.

It is convenient at this point briefly to consider the scope of the doctrine of sovereign immunity upon which the defendants rely in answer to these proceedings. It is stated as follows in Dicey's *Conflict of Laws*, 6th ed., p. 131: "The court has . . . "no jurisdiction to entertain an action or proceeding against—
" (1) any foreign sovereign . . . An action or proceeding against
" the property of any of the foregoing (a foreign sovereign) is, for
" the purpose of this Rule, an action or proceeding against such
" person."

The rule as so stated was approved by Lord Radcliffe in *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England*.⁴⁵ If it applies to the present action at all, it can only be on the footing that the action is one against the property of Pakistan for, as the judge correctly pointed out, the sovereign is not directly impleaded. In *Compania Naviera Vascongado v. S.S. Cristina*⁴⁶ Lord Maugham said that if a foreign State "is, rightly or wrongly, in possession of property
" in this country, no action can be brought against it by persons
" claiming title to or any interest in such property." The doctrine

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⁴⁵ [1952] A.C. 582, 615.⁴⁶ [1938] A.C. 485, 517.

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is not, however, limited to cases where the State has possession of property; for, as Lord Wright observed in the same case, the interest which it claims may be ⁴⁷ “not merely not proprietary “but not even possessory.” A good example of the accepted range of the principle may be found in certain of the requisitioning cases, in which the State, which requisitioned a ship, acquired direction and control over it without being in possession of it and without acquiring any proprietary interest in it. An example of such a case was *The Broadmayne*.⁴⁸ The question is, then, whether the interest which Pakistan took in the fund, through its agent Rahimtoola, as I have attempted earlier to define that interest, can be regarded as “property” within Dicey’s formula. It was the right of a principal to control the legal title of its agent to a debt; and a debt in which neither principal nor agent had any beneficial interest. True it is that Pakistan had the legal right to compel Rahimtoola to withdraw the money from the bank and to hold it to the order of the State; or to transfer the legal title to the State or in accordance with its directions. As, however, these vicarious rights of Pakistan in relation to the fund were unaccompanied by any scintilla of beneficial interest, it seems to me that to regard them as constituting “property” in the relevant sense of that term would be to extend the principle of sovereign immunity into an entirely novel field; for even in the cases of requisitioned ships, to which I have referred, the State which requisitioned them acquired a control which operated to its own advantage and benefit. In the present case the indirect control over the fund which Pakistan acquired in 1948 was not attended by any such advantage or benefit to itself. In addition to these considerations, I would add that if Pakistan had been forced to resort to litigation in this country for the purpose of compelling Rahimtoola to transfer the legal title to the State, I am far from satisfied that the court would have made an order upon him so to do without notice to, and against the wishes of, the apparent beneficial owners of the fund. Whatever dominion and control Pakistan had over Rahimtoola, as being the agent of the State, he was, in relation to the plaintiffs, a bare trustee for them of the legal title; and it is not the practice of our courts, in such a case, to direct a transfer of the legal estate in the absence of the beneficiaries and without regard to their wishes. In these circumstances, and in view of Lord Maugham’s disinclination (as appears from his speech in *The Cristina* ⁴⁹) to extend the doctrine

⁴⁷ [1938] A.C. 485, 507.

⁴⁹ [1938] A.C. 485.

⁴⁸ [1916] P. 64.

of sovereign immunity, a disinclination which was shared by Earl Jowitt and by Lord Tucker in the *Dollfus Mieg* case,⁵⁰ I should, for myself, hesitate to hold that the somewhat remote and detached interest which Pakistan had in relation to the fund ought properly to be regarded as "property" within the rule as stated in Dicey. It is not, however, necessary to express any concluded view as to this because, in my judgment, the claim which the defendants found upon the principle of sovereign immunity fails for a different reason.

It was sufficiently established by the evidence which was before the judge that the control which the defendant Moin Jung had over the deposit account at the Westminster Bank, on and before September 16, 1948, was in the nature of a fiduciary power which had been vested in him by the plaintiffs. Whether he could, on his own authority, have exercised that power by withdrawing money from the bank for the purpose of purchasing machinery for the Nizam or his Government I am not altogether sure; but, if he could have done so, that was the limit of his independent initiative in relation to the account. Certain it is that he could not, without the plaintiffs' authority, apply the fund to any other purpose, nor could he properly transfer the control of the account to anybody else. When the matter was before the judge there was no evidence that the plaintiffs had not authorized the transfer of the account to Rahimtoola, and Upjohn J. quite rightly declined to act upon the assumption that this transfer was effected without the plaintiffs' authority. Before us, however, an affidavit by the Nizam was, by leave, put in, and this established that the transfer was carried out wholly without the plaintiffs' consent and even without their knowledge. It accordingly follows that the action of the defendant Moin Jung in passing the control of the fund over to Rahimtoola, as Pakistan's agent, was, vis-à-vis the plaintiffs, unauthorized and wrongful. In these circumstances Sir Andrew Clark relied upon a principle which is stated in Halsbury's Laws of England, 3rd ed., vol. 1, p. 233, in the following terms: "The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless,

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⁵⁰ [1952] A.C. 582.

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“ before the claim for repayment was made upon him, he has paid
“ it to the principal or done something equivalent to payment
“ to his principal.”

The latter part of this proposition has been recognized or applied in a number of cases ranging from *Buller v. Harrison*⁵¹ to *Gowers v. Lloyds and National Provincial Foreign Bank Ltd.*⁵² The relevant authorities have been fully reviewed in the judgment of the Master of the Rolls and Birkett L.J., which I have had the advantage of reading in advance. It appears to me that all the essential features of the principle existed in the present case. The defendant Moin Jung wrongfully transferred the credit balance of the plaintiffs' deposit account to Rahimtoola as Pakistan's agent. By letter dated May 17, 1954, Messrs. Stanley Johnson & Allen, the solicitors acting for the plaintiffs, wrote to Rahimtoola informing him that the fund which had been transferred to his account had at all material times been, and still was, the property of the plaintiffs, and that they now required the sums in question to be paid to them or to their order. By this date Rahimtoola had not paid the money to his principals, Pakistan, nor had he done, or been required by them to do, anything equivalent thereto. In accordance with the principle in question, it would seem, therefore, to follow that upon receipt of the letter of May 17, 1954, Rahimtoola became personally liable to repay the money to the plaintiffs. From that time onwards, therefore, the right of Pakistan, as principals, to call for a transfer by their agent Rahimtoola of the legal title had been superseded by the exercise of the plaintiffs' right to call for it themselves.

The only way, as it seems to me, that the defendants could successfully escape from this position would be by identifying Rahimtoola with the State of Pakistan. If the State itself had had the legal title to the fund, it is true that the plaintiffs could not have sued here for the transfer of the title to themselves without directly impleading the State. The defendants contend that as Rahimtoola was the organ of Pakistan the same result must follow. As I have already said, however, the defendants have not proved this, nor is the contention sufficiently supported by any presumption. Reliance was also sought to be placed by the defendants upon the decision and reasoning of the *Dollfus Mieg* case,⁵³ and it was said that even if Rahimtoola was no more than the servant or agent of Pakistan, nevertheless the State had vicarious possession of the fund, through him, that this possession

⁵¹ 2 Cowp. 565.

⁵³ [1952] A.C. 582.

⁵² [1938] 1 All E.R. 766.

continued down to the date of the writ, and that Messrs. Stanley Johnson & Allen's letter of May 17, 1954, was ineffective to disturb it. In my judgment, however, there are differences of fundamental importance between the *Dollfus Mieg* case⁵³ and the present. The subject-matter of the former case was gold bars, namely, chattels, and it is clear that a sovereign State can have possession of chattels through any agent appointed for the purpose. A credit balance on an account with a bank, however, is a chose in action and cannot, as such, be the subject of a possessory, as distinct from a legal or equitable, title: *Torkington v. Magee*⁵⁴; *Colonial Bank v. Whinney*⁵⁵; *In re V.G.M. Holdings Ltd.*⁵⁶ The *Dollfus Mieg* case,⁵⁷ accordingly, provides the defendants, in my opinion, with no sufficient substitute for showing, which they have failed to do, that Rahimtoola was the alter ego of the State. It is to be observed, further, with reference to the case of *Dollfus Mieg*,⁵⁷ that a State can *only* have possession of chattels through an agent. On the other hand, it can certainly have a bank account in its own name, as the Nizam's Government of Hyderabad formerly had with the Westminster Bank; and the fact that Pakistan at no time took steps to have the fund now in question put into an account in its name or under its direct control is perhaps in itself indicative of the view that Rahimtoola was not its organ but its agent.

In my judgment, accordingly, the principle of *Buller v. Harrison*⁵⁸ applies and is a sufficient answer to the defendants' motion. It appears to me, however, that an equivalent result may be achieved by proceeding along a somewhat different route. The effect of the transfer of the fund by the defendant Moin Jung to Rahimtoola was, in my judgment, as I have already said, to give rise to a resulting trust in favour of the plaintiffs. It is elementary law that a trustee is bound to deal with trust property in accordance with the directions of the sole party beneficially interested therein or of the parties collectively, if there are more than one of them. Applying that principle, then, to the facts of the present case, Rahimtoola was bound, at all times after September 16, 1948, so long as the fund remained under his control and he had received no contrary instructions from his principals, to comply with such directions as he might receive

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⁵³ [1952] A.C. 582.⁵⁴ [1902] 2 K.B. 427, 430; 18 T.L.R. 703.⁵⁵ (1885) 30 Ch.D. 261; 2 T.L.R. 747.⁵⁶ [1942] Ch. 235, 241; 58 T.L.R. 131; [1942] 1 All E.R. 224.⁵⁷ [1952] A.C. 582.⁵⁸ 2 Cowp. 565.

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from the beneficial owners of the fund—whom he knew to be the plaintiffs or one of them. From this it follows that he came under an immediate obligation, enforceable by our courts in the exercise of their equitable jurisdiction, to comply with the requirements of the letter of May 17, 1954, which he received from the plaintiffs' solicitors. This obligation overrode and superseded, in my opinion, any duty arising from his agency to obey directions given to him subsequently by his principals, for his agency had become subordinated to his trusteeship.

Either, then, on this ground, or on the principle of *Buller v. Harrison*,⁵⁸ the defendants are, in my judgment, precluded from successfully resting upon the doctrine of sovereign immunity as an answer, per se, to these proceedings. In these circumstances, it becomes unnecessary to form any definite conclusion as to whether that doctrine is in any event displaced, as Sir Andrew Clark contended, by reason of an exception which our law has engrafted upon it. That exception, stated in the briefest way, is that our courts will not be deterred from administering a British trust by reason only that a beneficial interest in the trust fund is claimed by a sovereign State. Sir Andrew Clark submitted that that exception applies to the present case in that the credit balance on Rahimtoola's account is a trust fund, that it is within the jurisdiction, and that the court has the right and duty to administer the trusts affecting it notwithstanding the claim which is made in relation to it on behalf of Pakistan. As I say, it is not necessary to express any final opinion upon this exception to the doctrine inasmuch as, in my view, the doctrine itself does not apply. My provisional opinion is, however, that the so-called "trust" cases are not relevant to the circumstances of the present litigation. In the first place Rahimtoola does not seem to me to be sufficiently dissociated from Pakistan for the purposes of the exception. I think those cases are only properly applicable where the court finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in which the person who controls the fund combines the character of trustee with that of agent for the foreign State which is setting up an interest in the fund. The contrary view, as it seems to me, would stretch what has hitherto been regarded as an exception to the doctrine to a point at which it ceases to be reconcilable with the doctrine itself. An additional reason why I should hesitate to hold that the exception applies is that Pakistan

has not sought to establish any beneficial interest in the fund; its claim, as urged before the court, is limited to the legal title to the fund and is founded upon agency, and not the trusteeship, of Rahimtoola. Such a position, as I am inclined to think, is outside the scope and ratio alike of the relevant authorities which were brought to our attention.

Evidence was before us which was not before Upjohn J., and this additional evidence enabled arguments to be presented to us which were not, and could not have been, presented to him. In the light of this further material I have reached the conclusion that the principle of sovereign immunity affords the defendants no answer in itself to the plaintiffs' action, from which it follows that I agree that the appeal should be allowed.

Appeal allowed.

*Leave to appeal to the House of Lords
granted to the respondent Habib
Ibrahim Rahimtoola.*

Solicitors: *Stanley Johnson & Allen; Sanderson, Lee, Morgan,
Price & Co.; Freshfields.*

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A vendor was the registered proprietor at the Land Registry of a piece of land of which the southern or road frontage and rear boundary were roughly parallel. The western boundary was at right angles to them. The eastern boundary started at right angles from the road but after a short distance bent inwards towards the west. The vendor divided the piece of land into five plots, their side boundaries in each case had an angle following, in effect, the line of the vendors' eastern boundary. The defendant, the first purchaser, in 1949 purchased plot No. 4. He was aware

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of the system of lay-out adopted by the vendor and the plan both on the sale agreement and on the transfer of his plot to him showed the sides of his plot as having an angle. The plan, however, on his land certificate indicated the sides of his plot by dotted lines running straight without a break from the road frontage to the rear boundary. The land certificate was stamped with the following note: "The boundaries shown by the dotted line have been plotted from the transfer plan and are subject to revision on survey after the erection of fences." The defendant proceeded to erect a house on his plot on the assumption that his side boundary was a straight boundary with the result that at the point of the angle in the boundary it was in part built on the adjoining plot No. 3 which was purchased by the plaintiff in 1951. The defendant also laid out his garden on the same assumption. The plaintiff claimed a declaration that his north-eastern boundary was, in effect, what was shown as the south-western boundary on the plan on the transfer to the defendant of his plot, an injunction and damages:—

Held, (1) on the facts that the dispute was not a property dispute, in the sense that the wrong property had been conveyed to the defendant, but it was a dispute as to boundaries.

(2) That on the true construction of section 76 of the Land Registration Act, 1925,¹ and of rule 284 of the Land Registration Rules, 1925,² the boundaries on the general map or filed plan of the Land Registry were not intended to be more than indicated and they were not precisely defined; and that the plan on the defendant's land certificate could not be set up to overturn the plain effect of what would otherwise result from the bargain he had made with his vendor and recorded in his contract of sale and in his instrument of transfer; and that accordingly the plaintiff was entitled to the relief for which he asked.

Decision of Jenkins L.J. sitting as an additional judge of the Chancery Division affirmed.

¹ Land Registration Act, 1925, s. 76: "Registered land may be described—(a) by means of a verbal description and a filed plan or general map, based on the ordnance map; or (b) by reference to a deed or other document, a copy or extract whereof is filed at the registry, containing a sufficient description, and a plan or map thereof; or (c) otherwise as the applicant for registration may desire, and the registrar, or, if the applicant prefers, the court may approve, regard being had to ready identification of parcels, correct descriptions of boundaries, and, so far as may be, uniformity of practice; but the boundaries of all freehold land and all requisite details in relation to the same shall,

"whenever practicable, be entered on the register or filed plan, or general map, and the filed plan, if any, or general map shall be used for assisting the identification of the land."

² Land Registration Rules, 1925, r. 284: "(1) Renewal, revision, or correction of plans and verbal descriptions of land may be made at any time on the application in writing of the proprietor, upon the production of such evidence and the giving of such notices as the registrar may deem necessary.

"(2) Revision or correction of any part of the General Map may also be made at any time on the application of the proprietor of the land to which such part relates."

APPEAL from Jenkins L.J., sitting as an additional judge of the Chancery Division.

The plaintiff, Albert Lee, was the owner and occupier of a plot of land on which he had built a dwelling-house, No. 17, Oakleigh Park South, Whetstone, Middlesex. The defendant, Theodore Francis Henry Barrey, was the owner and occupier of the adjoining plot on which he had built a dwelling-house, No. 19, Oakleigh Park South. The plaintiff and the defendant were registered with absolute titles at the Land Registry.

These two plots originally formed part of a larger piece of land of which Ernest John Morsley was registered as proprietor with an absolute title. In 1949 he decided to sell the whole area in building plots. The vendor's land had a frontage to Oakleigh Park South of 211 feet 6 inches and a total width at the rear of 161 feet, with a depth of about 250 feet. The land lay due north along the road. The eastern boundary ran northwards from the road for a distance of 44 feet, it then turned slightly westward for about 147 feet then turning northward. The vendor divided the area into five plots having road frontages of approximately 42 feet each, with rear boundaries of 32 feet. In order to conform with the eastern boundary the vendor adopted a lay-out with an angle in the side boundaries, which gave to plots 2, 3 & 4 an additional piece of land on their side boundaries in the shape of an elongated triangle at the expense of their eastern neighbours.

The defendant entered into a formal contract dated July 6, 1949, to purchase plot No. 4. The plan annexed to the contract showed the defendant's land with an angle in the side boundaries. The vendor's estate agent and the defendant's agent visited the site and to some extent pegged the boundaries. The position of the pegs was subsequently a subject of dispute. By instrument of transfer dated October 19, 1949, plot No. 4 was transferred to the defendant. The plan on the transfer showed the plot with an angle in his side boundaries. The transfer to the defendant was registered at the Land Registry on November 24, 1949. However, the Land Registry filed plan, a copy of which was attached to the land certificate issued to the defendant, did not accord with the instrument of transfer, in that it showed the defendant's plot as bounded by straight dotted lines on its western and eastern sides. The following statement was stamped on the land certificate: "The boundaries shown by the dotted lines "have been plotted from the transfer plan and are subject to "revision on survey after the erection of fences."

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The defendant proceeded to build No. 19, Oakleigh Park South, on his plot on the footing that the side boundaries were straight, and he sited his house so that part was erected on plot No. 3. The plaintiff by an agreement with the vendor dated September 25, 1951, agreed to purchase plot 3, which adjoined plot 4 on the west, and it was transferred to him by transfer dated October 30, 1951. The plaintiff had incurred expense in fitting his house on to his plot by reason of the encroachment of the defendant's house on to his plot.

In this action the plaintiff claimed: (1) a declaration that the north-eastern boundary of the plaintiff's land was, in effect, along the line shown on the vendor's scheme of lay-out; (2) an injunction to prevent the defendant from trespassing on the plaintiff's land; (3) an order directing the defendant to remove certain concrete paving constructed by him on the plaintiff's land; (4) damages. The plaintiff did not ask that the defendant should be ordered to remove any part of his house which encroached on the plaintiff's land.

The facts are more fully stated in the judgment of Lord Evershed M.R.

Jenkins L.J. gave judgment for the plaintiff.

The defendant appealed. After the decision of Jenkins L.J. had been given, the boundaries were resurveyed on behalf of the parties. No evidence was tendered but it appeared in the Court of Appeal that the result of that survey, when a different system of measurement was used, might be that the depth of the encroachment on to the plaintiff's plot was considerably greater than the 10 feet which Jenkins L.J. had inferred, having regard to the plans before him. The plaintiff, however, in the Court of Appeal, as in the court below, did not ask that the defendant should be ordered to remove the parts of his house which encroached on the plaintiff's plot, whether that encroachment was 10 feet or substantially greater.

J. A. Plowman Q.C. and D. A. Thomas for the defendant. Jenkins L.J. held that the boundaries on the filed plan were only general boundaries and that, having regard to rule 278 of the Land Registration Rules, 1925, in order to ascertain the true boundaries it was necessary to look at the plan on the transfer to the defendant. The judge attached too little importance to the filed plan. It appears from the notes to Brickdale and Stewart-Wallace on Land Registration Act, 1925, 4th ed., p. 204, that the boundaries on a filed plan are important. It is not correct to say that

such boundaries are only a rough approximation. The reference in section 76 of the Land Registration Act, 1925, to boundaries is not a reference to symbolic boundaries. They must be fixed with some precision. The discrepancies which have to be allowed for on the filed plan are only minor discrepancies. Here the discrepancy between the transfer plan and the filed plan is so great that this is not a case of a boundary dispute but of a property dispute. At its widest the area in dispute amounts to one quarter of the width of the plot. The defendant has been registered in respect of the wrong property and the plaintiff should have asked for rectification; he has not done that. Having regard to the provisions of section 82 (3) of the Land Registration Act, 1925, he might not have obtained rectification had he asked for it. [Reference was made to sections 19, 69, 76, 80 and 82 of the Land Registration Act, 1925.]

D. A. Thomas following. No reliance can be placed on the transfer plan. It is only a rough plan and the measurements on it are inaccurate.

Henry Salt Q.C. and *H. E. Francis* for the plaintiff. The reserved judgment of *Jenkins L.J.* was right. The only real question in the appeal is whether (as the defendant affirmatively contended in his defence and submissions below and in this court) the filed plan, showing on his land certificate as a straight, instead of as a dog's leg or angle line, the boundary between the defendant's plot and the plaintiff's plot, is conclusive between the parties. It is submitted that that contention is fallacious.

(1) The first purchaser from the common vendor was the defendant. He tendered a plan of his plot prepared by his own surveyor for annexation to the transfer, and showing the angled boundary on both sides in conformity with both the vendor's layout plan and his own contract plan, and after inspection and certain pegging of the site. This plan was annexed to the transfer to the defendant. [Reference was made to *Eastwood v. Ashton*.³] The defendant could not contradict the deed of transfer of which the plan formed the governing factor: *Norton on Deeds*, 2nd ed., p. 135. The defendant has not claimed to rectify his transfer deed and could not succeed against the plaintiff if he did. The defendant testified that he regarded his transfer plan as showing his true boundaries at the outset. Subsequently, he recklessly gave up a corresponding triangle of land to his other neighbour, and built so as to trespass against the plaintiff or the

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³ [1915] A.C. 900.

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common vendor. Apart from any statutory magic to be found in the Land Registration Act, 1925, which could transform the position, the plaintiff is bound to succeed as on a textbook case.

(2) The construction and effect of the transfer to the defendant and of the subsequent transfer of the last remaining plot to the plaintiff is not affected by anything supervening in the course of registration under the Act of 1925. This case poses no dilemma between a boundary dispute and a property dispute. The extreme points of the boundary between the two contiguous plots have never been in dispute. The question is whether they are connected by an angled line, as on all relevant plans except the defendant's filed plan, or by a straight line as on the filed plan ultimately produced by the Land Registrar without sufficient reference to the common vendor or to the plaintiff. Section 76 of the Land Registration Act, 1925, is the only section dealing with parcels, and even so for purposes of identification only. Section 68 makes a land certificate evidence but not conclusive evidence. Rules 272-285 inclusive of the Land Registration Rules, 1925, especially rule 278, make it abundantly clear that the filed plan indicates a general boundary only, which is left undetermined. There was never any fixing of precise boundaries under rules 276 and 277, which require a special procedure and notification of all parties affected. The defendant's land certificate and filed plan contain warnings (in print or by stamping) that the boundaries are not to be taken as finalized.

(3) Sections 19 and 69 of the Land Registration Act, 1925, are irrelevant to this case. They are concerned only with estate or quantum of interest and are designed to bring the new Act into line with the general principles of the 1925 Code. They presuppose *some* land in which a man has an estate, but they do not deal with the definition of *what* land. The question of parcels, area and boundaries is left to be covered by section 76 and the Rules cited.

(4) So far as registration is concerned, the boundary was undetermined and at large. The judge was right in so holding, and then in finding that the true boundary was the angled one shown on the defendant's transfer plan. The plaintiff was entitled to sue in trespass on that footing, and without any need to seek rectification of the register as a condition of so suing, or by way of additional relief. The Land Registrar is bound to revise the filed plans under rule 284 having regard to the judgment.

J. A. Plowman Q.C. replied.

LORD EVERSHERD M.R. I have come to the clear conclusion in this case that the decision of Jenkins L.J. was correct and should be affirmed. The action was brought by an owner of property in Oakleigh Park South, at Whetstone, in Middlesex, claiming a declaration that the north-eastern boundary of the plaintiff's land ran along a line indicated on a plan attached to the statement of claim and asking for an injunction to restrain a trespass, with consequential relief, including damages for trespass; in other words—and this is a matter which is not without significance, having regard to the argument—this was in form and in substance a trespass action.

The plaintiff's land, and also the land of the defendant, which adjoined, formed part of a property somewhat larger, which had belonged to one Morsley and which was registered at the Land Registry. The defendant was the first to buy a piece of Morsley's land. For the purpose of that and the succeeding sales, Morsley had divided the plot which he owned into five convenient smaller lots. Looking at the plans exhibited, the plots are numbered from 1 to 5, starting from the left, and that reference will be convenient for the purposes of my judgment.

The defendant's plot was numbered 4; that is the plot next but one to the right hand of the whole piece of land. His contract for purchase was made in July of 1949 and the instrument of transfer is dated October 19, 1949. Shortly after the date of that instrument, the transfer was lodged in accordance with proper practice with the Land Registry for registration, and in due course the Land Registry issued a land certificate relating to the defendant's purchase, the date which the document bears being January 16, 1950.

To complete the short narrative which alone is necessary for this purpose, the plaintiff became a purchaser by contract in September, 1951, and his instrument of transfer is dated in October, 1951.

The defendant had, in the meantime, begun the erection of his house, and if one looks at what is called Plan No. 1 (attached to the statement of claim) one sees that the house overlaps what the plaintiff alleges to be the true western boundary of the defendant's property to an appreciable extent. The extent of the overlap along the western boundary is not uniform, and for this reason: the piece of land which formerly belonged to Morsley is irregular in shape; that is to say, although on the western side the boundary appears to be substantially at right angles both to the northern and southern boundaries, on the east, the boundary,

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starting from the south, proceeds for a short distance only parallel to the western boundary and then bends inwards to the west, straightening out somewhat at its finish. In order to make the plots substantially equivalent in area and for the convenience of their gardens and so on, it is clear that the vendor adopted what has been called an angled division.

The result of that was that the defendant's plot No. 4 was itself irregular in shape; starting from Oakleigh Park South it proceeded at right angles to the road for a little and then bent in a westerly direction. The point where the bend occurred has been referred to as the "kink." The plaintiff alleged that the defendant's house overlapped what was his true boundary, the overlap occurring near the point of the kink. The angled dimensions which the plaintiff says must be attributed to the defendant's property produce, as contrasted with the result if the boundaries had been regular and straight, a strip widening to its maximum at the kink and tapering at each end to nothing.

The finding of the judge was to this effect, quite briefly, that the defendant, having entered into his contract and received his instrument of transfer, had then no doubt what the dimensions and boundaries of the property he had bought were; and the judge describes how the defendant went on to the site with representatives of his vendor, Morsley, and how there were pegs both on the east and west side of his land—pegs called "Y" and "S"—inserted to indicate on each side where the kink or kinks occurred. The defendant was not himself, at any rate at that stage, at all deceived or under any misapprehension as to the property which he had acquired; but as a result, unfortunately for him, of the impact of the Land Registration Act, 1925, upon these matters and as a result of the plan which appears on the certificate, that which formerly was clear became obscure. For the defendant appears to have assumed, when he started his building operations, that what had formerly been clear to him had been superseded by a new design, if I may use that word, for the land he had bought; so as to enable him to build his house at a position which would be on his land if, and only if, its western boundary went direct and by a straight line from Oakleigh Park South, northwards to the rear of the property.

I must say that I feel some considerable sympathy for the defendant since, having regard to the view I take, it must be allowed that he has paid dearly for the assumption that he made; but I have already indicated that I think it inescapable that he was wrong.

The case was put most clearly before us by Mr. Salt for the plaintiff, and I think I can do no better than to summarize the course which his argument took. He pointed out that if one looks at the transfer plan and bears in mind the circumstances of its preparation, the visit to the site and the identification of the pegs "Y" and "S," to which I have already alluded, there can be no doubt whatever about what were the boundaries of the property which the defendant had bought and had intended to buy. Therefore, Mr. Salt said, apart from any argument which can be derived from the language of the Land Registration Act, 1925, and the rules made thereunder, this might be called a textbook case.

Mr. Plowman, in truth, does not dissent, so far, from that argument. If this were a case of unregistered land and the question of the site of the boundaries depended upon the conveyances, or their equivalent, there could be no doubt where the defendant's boundaries should be found.

But the case for the defendant has rested upon the view taken and advanced of the effect of the Land Registration Act, 1925, and of the statutory provisions upon the land certificate, which is undoubtedly the defendant's document of title. Mr. Plowman referred us to sections 19 and 69 of the Act, which provide that the transfer shall be completed by an entry on the register and that when that entry takes place and the certificate is issued in respect of it, then by section 69 the proprietor is deemed to have vested in him what the certificate certifies that he owns.

The question of identification and boundaries is dealt with exclusively by section 76 of the Act itself, plus rules which have been made under the Act. Section 76 provides as follows: [His Lordship read section 76 and continued:] The rules applicable to this case consist of rules 272 to 285. Of that section of the rules, I refer only to rule 284, which provides: "Renewal, revision, or correction of plans . . . may be made at any time," as provided; and that "revision, or correction, of any part of the General Map may also be made at any time," as provided.

In order to dispose of the matter, it is desirable to mention that, apart from what is called the filed plan, or the general map, with which in this case we are concerned, there are provisions for having what is called a fixed plan, in which case there is prepared a precise map fixing precisely the boundaries. The annotators of Brickdale & Stewart-Wallace Land Registration Act, 1925, 4th ed., p. 450, point out that that procedure is seldom resorted to, no doubt owing in part to the cost and trouble it

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entails. It is sufficient to say that it was not resorted to here and that there is no question that it was.

In those circumstances, as we are concerned with a general filed map or plan, the sole question for us is whether, notwithstanding the transfer and the facts I have mentioned, the effect of the statutory provisions, sections 19 and 69 in particular, is that as matters stand what the defendant has, and is entitled to say he has, is a piece of land identified by reference to the map on his certificate; and the argument is that, if you look at that map, it is as plain as possible that there is no question of an angled division; the piece of land of which the defendant is certified as proprietor is regular in shape. It is, in fact, identified by reference to two pegs, which can be shown to be in a straight line from the respective corners, and the defendant contends that if the plaintiff desires to say that that is wrong, then what he should do is to make application to rectify the register. That was the significance of my reading the claim in the writ and the statement of claim, for it will be recalled that no request for rectification is there contained. It seems to me, therefore, in the end of all, that the matter comes down to this, in the light of the statutory provisions and looking at the land certificate: is this a case in which the defendant can, as things now are, say: "I have got a piece of land, the boundaries of which are sufficiently identified and are such that my house at no point trespasses upon the plaintiff's property"? Or, on the other side, is the right answer that the identification in the certificate is not, and does not purport to be, a precise signification—a precise showing—of the boundaries, which boundaries can properly be discerned from other material in the case? That is the point.

There is no doubt that, at the kink itself, the divergence between the transfer plan and what appears on the face of it from the certificate plan is not negligible. On the plan marked No. 1 attached to the statement of claim, measurements indicate that it is in the region of 10 feet, and it may even be that if another method of measurement were adopted, the extent of that divergence would be substantially greater. Since the whole frontage to Oakleigh Park South is only 42 feet, it can be seen at once that this is not a mere trifling divergence.

But with all respect to Mr. Plowman's argument, which he has put before us with his customary skill and force, I find myself to be in this respect of entirely the same opinion as was Jenkins L.J. I would go with Mr. Plowman this far, that a boundary dispute and a property dispute may be two things quite

different. It is true that a property dispute may, and frequently does, involve boundaries, and that a boundary dispute involves in some degree a property dispute; and if the divergence is very great indeed, you may say that the matter has passed from any sensible use of the phrase "boundary dispute" and becomes something else. But applying the common sense test, if, as Mr. Plowman invited us to do, you put the question here: is the plaintiff saying in truth that the defendant got the wrong property by the land certificate? I would answer the question negatively. I think, for my part, that there is no doubt that the certificate purported to give him, and gives him, the right property. What, on the evidence, it has failed to do is to indicate its boundaries with sufficient correctness and precision.

I agree with Mr. Salt that sections 19 and 69 are directed to bringing registered land into the general scheme of the property legislation of 1925, and are not concerned with the sort of question which arises in this case. I further agree with Mr. Salt that section 76 and the rules provide, and I think provide clearly enough, that in the case of a general map or filed plan the boundaries are not intended to be more than indicated and not precisely defined. If there were any doubt about that, I think the matter is really made plain beyond a peradventure by the land certificate here in question. For under the heading on the attached general map of "Friern Barnet Parish" occurs a note, which has obviously been stamped on the document, as follows: "The boundaries shown by the dotted lines have been plotted from the transfer plan and are subject to revision on survey after the erection of fences."

I would add that on the back sheet of the certificate is a number of notes, and one of the notes is no more or less than a substantial paraphrase of rule 278 of the Land Registration Rules. There is only one dimension on the plan, namely, the frontage to Oakleigh Park South, 42 ft. 0 in. No dimensions are given showing where the corners of that frontage are to be found in relation to any other fixed point on the surface, nor are any other dimensions as regards the property certified given. The dotted lines indicate the western and eastern boundaries of the land certified on which there were not—and substantially still are not—any fences. You are, therefore, told that this document does no more than indicate the boundaries, and—what I think is far more significant—that what they are intending to do is to show what you would find on the transfer plan. When all that is added together, I am for my part left in no doubt that this plan cannot

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be set up to overturn the plain effect of what otherwise would have resulted from the bargain made between the defendant and his vendor as had been recorded in his contract and in his instrument of transfer.

The judgment of my brother sitting at first instance was a judgment which he reserved and which carefully puts all the points and he considers them. I should be quite content really to have left it so by expressing my own concurrence with his judgment; but I have shortly stated my own conclusion of the points as presented out of respect for the arguments we have heard.

For the reasons which I have given, I think that this appeal fails and must be dismissed.

BIRKETT L.J. I agree with the judgment which has just been delivered by the Master of the Rolls, and I have nothing to add.

ROMER L.J. I also agree, and I have only a word or two which I should like to say.

It is, of course, fundamental to Mr. Plowman's case that this dispute ought properly to be regarded not as a boundary dispute but as a property dispute; because, if it is in fact a boundary dispute, it cannot succeed for the reasons which the Master of the Rolls has stated. For myself, I can only say that I have no doubt but that this is a boundary dispute within the usually accepted sense of that expression.

Morsley divided up this land which he owned into five parts, numbered 1, 2, 3, 4 and 5, and there is no doubt at all but that it was his intention to sell and it was the intention of the defendant to buy, plot No. 4; and there is no doubt but that in substance the defendant had plot No. 4 conveyed to him. Therefore, it seems almost impossible to my mind to say that this is a property dispute in the sense that the wrong property was conveyed to the defendant, because he had conveyed or transferred to him the plot which he intended to have, namely, plot No. 4.

But when, in addition, one appreciates that the discrepancy which the plan reveals is only 10 feet at one point, and then both to the north and the south of that point the divergency decreases until it ceases to exist as a divergency at all, it seems to be quite plain that this in substance is a matter of boundaries and not a matter of property, although, as the Master of the Rolls said, the two conceptions of necessity sometimes overlap. But once

one arrives at the conclusion that this is a boundary dispute, it appears to me that that is inevitably the end of the defendant's case. Accordingly, I agree that the appeal must be dismissed.

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Appeal dismissed.

Solicitors: *R. C. Bartlett & Co.; Milnes & Milnes.*

B. A. B.

In re MARSHALL, DECED.

BARCLAYS BANK LTD. *v.* MARSHALL AND OTHERS.

[1956 M. 1071.]

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Jan. 11, 15;
Feb. 6.

Harman J.

Conflict of Laws—Adoption—Succession—Will—Adopters domiciled in British Columbia—Children born and adopted in British Columbia—Whether adopted children entitled under substitutional gift to issue of adopter under English will—Adoption Act, 1950 (14 Geo. 6, c. 26), s. 13 (1) (4).

Will—Construction—Class gift—Postponed vesting of—Class ascertained at death of testator—"Issue"—Whether including adopted child.

Will—Construction—Substitutionary gift.

T. by his will bequeathed legacies and his residuary estate after the death of his wife to certain named cousins, including C. S. J., with a substitutional gift as follows: "Provided always that 'should any of the above cousins be then dead leaving issue then 'living such issue shall take the share which his her or their 'parent would have taken had such parent survived me and my 'said wife and if more than one in equal shares.'" T. died in June, 1945, domiciled in England, and his wife died in January, 1955.

C. S. J. obtained a British Columbian domicile before 1912, and with his wife in 1913 entered into an agreement terminable on two weeks' notice whereby they took into their home a girl and thereafter brought her up as their child. In March, 1945, C. S. J. and his wife adopted by an order of the British Columbian Supreme Court a boy. C. S. J. died in February, 1950.

By a British Columbian Act of 1953 an adopted child was given general rights of inheritance and succession:—

Held, on a summons to determine whether or not the boy or the girl were entitled to take their adopted father's share under the will as his issue, (1) that there being no formal adoption of the girl, she could claim no rights of inheritance under an English will.

[Reported by JENNIFER WEST, Barrister-at-Law.]

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(2) That the relevant date for ascertaining the class of persons capable of taking was the date of the testator's death in 1945 and not that of his wife in 1955 when the interest vested; and that the boy could not succeed since neither by English law nor by British Columbian law at that date, 1945, did an adopted child have any general rights of inheritance and succession.

Per curiam. Had the relevant date been that of the wife's death in 1955 the boy would have succeeded, since the law of the succession imputes reference to the law of the domicile in matters involving status, and by British Columbian law at that date an adopted child stood in regard to the kindred of his parents by adoption as if born of those parents in lawful wedlock.

In re Andros (1883) 24 Ch.D. 637 and *In re Luck's Settlement Trusts* [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307 applied.

In re Donald [1929] 2 D.L.R. 244; *In re Pearson* [1946] V.L.R. 356; *In re Brophy* [1949] N.Z.L.R. 1006 and *In re Wilson* [1954] Ch. 733; [1954] 1 All E.R. 997 considered.

In re Wilby [1956] P. 174; [1956] 1 All E.R. 27 questioned.

ADJOURNED SUMMONS.

By this summons Barclays Bank Ltd. (hereinafter called "the bank"), the trustees of the will of Chapman Frederick Dendy Marshall (hereinafter called "the testator"), asked whether or not Anthony Francis Stansfeld Jones or Deirdre Georgina Stansfeld Jones, the adopted children of Charles Stansfeld Jones, a cousin of the testator, the eighth and ninth defendants to the summons, were entitled to share in certain chattel legacies, and in the residuary estate of the testator with the first seven defendants to the summons, who were also cousins of the testator. The said legacies and residuary bequest took effect upon the death of the testator's wife, Adela Rose Marshall (hereinafter called "the widow").

The remaining facts are fully set out in the judgment.

Mark W. Cockle for the bank.

Frank Gahan Q.C. and *J. G. Le Quesne* for the eighth and the ninth defendants. The reference in the will to "issue" raises a question of status to be governed by British Columbian law as the law of the adopter's domicile at the date of his death: Cheshire on Conflict of Laws, 4th ed., pp. 400-403. This is not, therefore, a question of construction which would be determined solely by English law. Section 9 (c) of the Revised Statutes of British Columbia, 1936, shows that adopted children should be treated as the children or issue of their adopting parents: it is unnecessary, once this is established, to consider further whether

or not they are under that law excluded in any circumstances from succession to property, since in turn this becomes a question of construction to be governed by English law. *Nataraja Pillai v. Subbaraya Chettiar*¹ supports this view; it was not cited to Barnard J. in *In re Wilby*.² The latter case should not, therefore, be followed and further deals with inheritance under an intestacy. Vaisey J. in *In re Wilson*³ left open the point which has to be considered here, but said that he considered that facts such as those present here would present a far stronger case for the adopted child to succeed. *In re Donald*⁴ was wrongly decided, since it states that this is not a question of status; *In re Pearson*⁵ and *In re Brophy*⁶ support the contention for these defendants.

Analogy should here be made with the legitimization cases. *In re Luck's Settlement Trusts*⁷ establishes that where the father is domiciled both at the child's birth and at the act of adoption in a country recognizing such act of legitimization, the child is recognized as legitimated in England, since this is a question of status.

A. A. Baden Fuller for the first seven defendants. This is a question of construction; the normal meaning of "issue" is a legitimate child and it does not apply to an illegitimate or an adopted child: *In re Fletcher*.⁸ The rule in *Hill v. Crook*⁹ cannot apply here, since no such intention can be gathered from the will. Even if the relevant date for ascertaining the class of issue is 1955—the death of the testator's widow—the common law meaning of issue as issue of the body must apply here, since the extended meaning supplied by the Adoption Act, 1950, does not apply to a foreign adoption.

If reference is made to the law of the domicile, then the relevant date for ascertaining whether or not the eighth defendant should be treated for all purposes of succession as the issue of Charles Stansfeld Jones is that of the testator's death in 1945, and not that of the widow in 1955. At that date, 1945, under section 9 (c) of the Revised Statutes for 1936 he had acquired the status of a natural born child only as between himself and his parents by adoption. The cases cited in support of his claim

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¹ (1949) L.R. 77 I.A. 33.

² [1956] P. 174; [1956] 1 All E.R. 27.

³ [1954] Ch. 733; [1954] 1 All E.R. 997.

⁴ [1929] 2 D.L.R. 244.

⁵ [1946] V.L.R. 356.

⁶ [1949] N.Z.L.R. 1006.

⁷ [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307.

⁸ [1949] Ch. 473; [1949] 1 All E.R. 732.

⁹ (1873) L.R. 6 H.L. 265.

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have, therefore, no application to these facts. Even if the relevant date is 1955, the cases cited can be distinguished. In *In re Luck's Settlement Trusts*¹⁰ the child was the illegitimate as well as the adopted child of its adopting parent; *In re Donald*¹¹ states that the child must be the legitimate offspring of its parents. *Nataraja Pillai v. Subbaraya Chettiar*¹² should not be followed, since the Privy Council dealt there with the specialized rules of the Hindu common law, the object of which are to create an heir and which, therefore, applied only to British India.

Frank Gahan Q.C. in reply. Once the relationship of parent and child is created by the law of the domicile, then the will must be construed by English law and adopted children treated as lawful natural born children. It follows that at whichever date one considers the facts, there was between Charles Stansfeld Jones and the eighth defendant the relationship of father and child, and he must therefore be treated as the "issue" of Charles Stansfeld Jones in construing the will.

Cur. adv. vult.

Feb. 6. HARMAN J. read the following judgment: The testator died domiciled in England on June 14, 1945, having by his last will, made on April 12, 1945, bequeathed his not inconsiderable estate, valued for probate at some £40,000 and comprising a very large number of chattels, to the bank upon trust for the widow during her life. On her death, the testator bequeathed a large number of chattel legacies and one pecuniary legacy and left his residue to certain of his cousins, who were also legatees, in equal shares of a number of the chattels provided that they survived the widow. Such as did so are the first seven defendants to the summons. There were three others, two of whom predeceased the widow and left no issue: the third, Charles Stansfeld Jones, died in February, 1950. The will contains a clause of substitution in these terms: "Provided always that should any of the above "cousins be then dead leaving issue then living such issue shall "take the share which his her or their parent would have taken "had such parent survived me and my said wife and if more "than one in equal shares." The last two defendants claim to be the children of Charles Stansfeld Jones and, therefore, entitled to share with the first seven defendants under the substitution clause.

¹⁰ [1940] Ch. 864.

¹² L.R. 77 I.A. 33.

¹¹ [1929] 2 D.L.R. 244.

Charles Stansfeld Jones appears to have emigrated to Canada some time before 1912. He settled in British Columbia with his wife and, according to the evidence before me, was undoubtedly domiciled in British Columbia in 1912. He had no issue born of his wife.

The ninth defendant was born on July 18, 1912, in British Columbia and was then known as Georgina Dale. She was apparently in charge of The Children's Aid Society of Vancouver, British Columbia, when, by an agreement under the hands of its president and secretary dated April 14, 1913, and expressed to be made between the society and Charles Stansfeld Jones and his wife, the society agreed to commit the care of the child to Mr. and Mrs. Stansfeld Jones who, on their part, agreed to receive her into their home and to act towards her at all times with kindness and consideration and to provide her with food, clothing, washing and necessaries. Mr. and Mrs. Stansfeld Jones further agreed to treat the child as a member of the family and to educate her. Clause 4 of the agreement is in these terms: "It is agreed that "the said child shall remain in the care of the said parties of the "second part so long as both parties hereto are satisfied with "this arrangement, and that while with them the child may be "visited by any person duly authorized to do so; also that should "it be found necessary to return the said child the parties of the "second part shall give two weeks' notice of their intention to "the secretary, and pay the return fare."

The ninth defendant has ever since lived as a member of the family and used the surname Stansfeld Jones. She has been treated and referred to as their daughter by Mr. and Mrs. C. R. Stansfeld Jones.

The eighth defendant was born on August 25, 1934, at Vancouver, British Columbia, and went by the name of Anthony Yates: he was apparently under the legal guardianship of the before-mentioned Children's Aid Society until adopted by Mr. and Mrs. Stansfeld Jones under an order of the Supreme Court of British Columbia made on March 9, 1945. This was a joint adoption made on the petition of the adopters and the order is very similar to an English order for the same purpose.

The question is whether these defendants or either of them can take the share which Charles Stansfeld Jones would have taken in the testator's estate had he survived the widow, who died on January 10, 1955. In order to take they must satisfy the court that they are properly described in the will as issue of Charles Stansfeld Jones.

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In my opinion, so far as the ninth defendant is concerned, there can be no doubt that the answer must be in the negative. She may rank for some purposes as a natural child of her adoptive parents, but there was apparently no legislative adoption machinery existing in British Columbia in 1913, the date of the agreement I have recited, and no further step was ever taken to formalize the relationship. It is true that under some systems of law adoption is effected by agreement, and I suppose that it is possible that this court would give effect to such an agreement. The document in the present case, however, is not, in my judgment, a true adoption agreement at all. It is a mere putting out of the child as a foster-child, and can be terminated by the adopting party at any time on two weeks' notice. Such an agreement cannot possibly give the object of it rights of inheritance under general words in an English will.

The eighth defendant's claim is different and depends upon the order of the Supreme Court of British Columbia of March 9, 1945, shortly before the date of the will whereby he was adopted as a son of Charles Stansfeld Jones and his wife.

The rival contentions may be thus summarized. For the eighth defendant it is said that adoption is a matter of status, that the date for ascertaining who are issue of Charles Stansfeld Jones is the date of the widow's death because the interest given does not vest till that date. Suppose, therefore, the master be directed to inquire in the usual way whether Charles Stansfeld Jones survived the widow and, if he did not, whether he left any issue who did, the master will inquire for issue of Charles Stansfeld Jones at the relevant date, namely, the widow's death, and will find that the eighth defendant is such issue because his father and he being domiciled in British Columbia the English law will on a question of status follow the law of the domicile rather than the law of the testamentary disposition, and that under the former, having regard to an alteration made in 1953 to the Adoption Act of British Columbia, the eighth defendant ranks for all purposes of inheritance as if he had been born in legal wedlock to his adoptive parents.

The contentions of the first seven defendants may be stated as follows: (1) This is an English will of a domiciled Englishman and must be construed as such, the meaning given to the word "issue" being unaffected by the law of any foreign domicile. (2) The relevant date is the year 1945 when the will came into operation. (3) Even if the right date be 1955, the English law, namely, the Adoption Act, 1950, does not recognize a foreign

adoption and the common law prevails. (4) At common law issue means issue born in lawful wedlock to the parents and no adoptive child can properly be described as issue.

It may be convenient to consider the case first on the footing of the English law alone. Supposing both the adopter and the eighth defendant had been domiciled in England and an adoption order had been obtained from the English court in March, 1945, then the relevant Act would be the Adoption of Children Act, 1926, which by section 5 (2) expressly provides that an adoption order shall not confer on the adopted child any right under or interest in property as a child of the adopter, and the expression "issue" where used in any disposition whether made before or after the making of an adoption order shall not, unless the contrary intention appears, include an adopted child. It follows that at the date of the testator's death the eighth defendant would not have been recognized in England as issue of Charles Stansfeld Jones for purposes of inheritance.

If the testator had been domiciled in British Columbia and was disposing of property there, then the British Columbian law would have applied. Adoption in that province goes back to the year 1920, and the Act in force when the adoption order of 1945 was made was that which appears in the Revised Statutes for 1936, which consolidated the law. I read sections 9 (c), 10 (1) and 12. Section 9 (c): "The parent by adoption and the minor "so adopted shall sustain toward each other the legal relation "of parent and child, and shall respectively have all the rights "and be subject to all the obligations and duties of that relation, "including the right of inheritance and succession to real and "personal property from each other, except as those rights are "affected by the provisions of this Act." Section 10 (1): "As "to inheritance and succession to real and personal property, a "person adopted in accordance with the provisions of this Act "shall, subject to the provisions of subsection (2) of section 3, "stand in regard to the legal descendants, but to no other of the "kindred of his parent by adoption, in the same position as if "born to that parent in lawful wedlock." Section 12: "The "word 'child' or 'issue,' or its equivalent, in a will, grant, or "settlement shall include an adopted child, unless the contrary "plainly appears by the terms of the instrument."

It has not been suggested to me that the principles of construction applicable to the British Columbian statute differ from those which apply in this country. Considering, therefore, the statute, it appears to me that rights of inheritance

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and succession are given only as between each other to persons adopted and their adopters. Further, the status of an adopted person is only equated to that of a natural born child so far as regards the legal descendants of his adoptive parent. If, then, the relevant date be 1945, the eighth defendant could not succeed under British Columbian law.

Now, in my judgment, 1945, the testator's death, and not 1955, the widow's death, is the relevant date. It is true that interests in remainder after her death did not vest until that event. Nevertheless, it seems to me that the class of persons capable of taking must be capable of ascertainment when the will first comes into operation. The eighth defendant was not then such a person.

This is enough to dispose of the summons, for on this analysis neither law enables the eighth defendant to succeed. As, however, the further question was elaborately argued before me, I shall consider it.

I return, therefore, to the statutory provisions. The English law was altered by the Adoption of Children Act, 1949, now consolidated and re-enacted by the Adoption Act, 1950. Section 13 (2) provides: "In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person." Section 13 (4): "The references in this section to an adoption order include references to an order authorizing an adoption made after the commencement of this Act under the Adoption of Children Act (Northern Ireland), 1929." If, therefore, there had been an English adoption order and the relevant date be any date after the coming into force of the 1949 Act, the eighth defendant would be entitled to share.

It has, however, been pointed out by Barnard J. in the recent case of *In re Wilby*¹ that section 13 (4) of the Act of 1950 by necessary implication is confined to adoption orders made in England or Northern Ireland and it follows that if English law alone is relevant the eighth defendant cannot inherit. It also follows, in my opinion, from the judgment of Vaisey J. in *In re Wilson*,² that if Charles Stansfeld Jones, the adopter, or the eighth defendant were at the time of the adoption domiciled

¹ [1956] P. 174; [1956] 1 All E.R. 27.

² [1954] Ch. 733; [1954] 1 All E.R. 997.

either in England or in some country other than the country of the adoption the eighth defendant cannot inherit. That case leaves it open, however, to consider the question raised in the present case where both the adopter and the eighth defendant were domiciled in British Columbia at the time of the adoption there.

The British Columbian legislation was revised in 1948, but the 1936 position in this respect is left unaffected. In 1953, however, section 10 of the Act of 1948, which in effect repeated section 9 of the Act of 1936, was amended by striking out the words "the legal descendants but to no other of." The effect of this was that an adopted person stands in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock. If, therefore, the British Columbian legislation is to be followed in England and the relevant date is the death of the widow, the eighth defendant would be entitled to succeed.

Now this is an English will and therefore to be construed by English law. One view of this is that no other law need be looked at. "Issue" by English law means issue of the body unless there be some context to indicate a wider meaning. This was the view taken by the Supreme Court of Canada in *In re Donald*,³ rejecting the view that the legitimation cases are applicable to cases of adoption. Smith J. says⁴: "It seems clear that there 'is no principle in the rule referred to'—that is the legitimation cases—"that can be applied to an adopted child. The limitation as to parents marrying in the country of domicile can have no application in such case, and it was not suggested that the adopted child must be born in the domicile of the party adopting. The bequest in this case is to 'the children' of Andrew Speedie, and there is nothing in the will or the circumstances to indicate that these words 'the children' were used otherwise than in their ordinary sense. The judgment in *In re Andros*,⁵ as stated above, lays it down that English law (which is Saskatchewan law) 'requires that all who take under 'a gift to sons of a named father should be legitimate offspring.' Saskatchewan law therefore requires that the parties who take under this bequest to the children of Andrew Speedie shall be the legitimate offspring of Andrew Speedie, and the simple question is, does this adopted child come within that description? It seems perfectly clear that he does not, for the reason

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³ [1929] 2 D.L.R. 244.

⁵ (1883) 24 Ch.D. 637.

⁴ *Ibid.* 247.

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"that he is not in fact the offspring of Andrew Speedie. It is
"not a question of status, but a question of whether this adopted
"child is a person such as mentioned and described in this
"bequest."

This case does not seem to have been cited to Vaisey J. in
In re Wilson,⁶ but he nevertheless decided in the same way, as
the headnote shows: "*Held*, in deciding that the adopted child
"was not entitled to succeed under the intestacy as his child:
"(1) that the question whether an adopted child can succeed to
"property as the child of an adopter dying intestate is to be
"determined by the law governing the succession, not by that
"governing the adoption; (2) that an adoption effected under a
"foreign jurisdiction, in any event where no adopter was there
"domiciled at the date of the adoption, cannot give to the
"adopted person rights under the English law of intestacy."
He left open, as I have observed before, the circumstances which
exist here, but he says⁷: "In my judgment, if the testator had
"been domiciled in Quebec at the time when the infant defendant
"was adopted, the case of the latter would have been different
"and very much stronger."

The Canadian case to which I have referred has not received
universal approval. For instance, Gavan Duffy J., in *In re*
Pearson,⁸ expresses the opposite view. Similarly, in *In re*
*Brophy*⁹ the judge, after citing *In re Donald*,¹⁰ expressed the
opposite view. These, no doubt, are persuasive, but for an English
lawyer the authoritative decision is *In re Luck's Settlement*
*Trusts*¹¹ in the Court of Appeal, where the judgment of the
majority (Sir Wilfrid Greene M.R. and Luxmoore L.J.) definitely
states that the principle of the legitimization cases is applicable to
cases of adoption. They state¹²: "In our judgment the prin-
"ciples laid down in the authorities which we have cited"—
those are the authorities about legitimization per subsequens
matrimonium—"are not limited to the one case of legitimization
"per subsequens matrimonium. It is natural that references to
"that form of legitimization should have found a place in the
"statements of the law since that was the particular form that
"was relevant in those cases. But the language used is, we
"think, of wider import. In particular Lord Hatherley in the

⁶ [1954] Ch. 733.⁷ *Ibid.* 744.⁸ [1946] V.L.R. 356.⁹ [1949] N.Z.L.R. 1006.¹⁰ [1929] 2 D.L.R. 244.¹¹ [1940] Ch. 864; 56 T.L.R. 915;
[1940] 3 All E.R. 307.¹² [1940] Ch. 864, 881.

“ passages from *In re Wright's Will Trusts* ¹³ which we have
 “ cited lays down the principle in quite general terms which
 “ clearly cover the present case. He regards the law of the
 “ father's domicile as ‘fastening on’ the child at its birth and
 “ as determining the nature of their relationship. If by the law
 “ of that domicile, the relationship is immutably that of putative
 “ father and illegitimate child, nothing thereafter can change it.
 “ If, on the other hand, by the law of that domicile such relation-
 “ ship is not immutable but is capable of becoming that of father
 “ and legitimate child, that capacity when duly fulfilled is to be
 “ recognized by the courts of this country. There appear to us
 “ to be sound reasons in principle why this should be the law.”

No doubt, as Vaisey J. said in *In re Wilson*,¹⁴ the analogy must be used with caution. I also agree with him that the law applicable is the law of the succession, but that does not, in my judgment, preclude reference to the law of the domicile because the law of the succession may import it. This is pointed out by Kay J. in *In re Andros* ¹⁵ in these words: “A bequest in an English will to the children of A means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children? That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined?” And the judge comes to the conclusion that the law of the domicile controls this matter. The Court of Appeal in *In re Luck's Settlement Trusts* ¹⁶ approves of this, and of *In re Grove* ¹⁷ and *In re Wright's Will Trusts*.¹⁸ The court also approves of Professor Dicey's statement in the 1931 edition of his book and disapproves of the statement of the later editor (Professor Keith) which was read by Vaisey J. in *In re Wilson*.¹⁹

If, therefore, I had been of opinion that 1955 was the relevant date, I should have held the eighth defendant entitled to share with the first seven because he and his adoptive parent were both domiciled in British Columbia when he was adopted. I am aware that this is not consistent with Barnard J.'s view in *In re Wilby*.²⁰ He was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of

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¹³ (1856) 2 K. & J. 595.¹⁴ [1954] Ch. 733.¹⁵ 24 Ch.D. 637, 639.¹⁶ [1940] Ch. 864.¹⁷ (1888) 40 Ch.D. 216.¹⁸ 2 K. & J. 595.¹⁹ [1954] Ch. 733, 743.²⁰ [1956] P. 174.

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skilled persons. It does not prevent the law of the domicile prevailing in cases of legitimation by other means, and should not do so, in my view, in cases of adoption which is a kind of legitimation. In any event, *In re Luck's Settlement Trusts*,²¹ which was apparently not cited to Barnard J., points in this direction, and I think that I ought to follow it.

In the present case, however, taking, as I do, the year 1945 to be the relevant date, I am of opinion that neither the English nor the British Columbian system would entitle the eighth defendant to succeed, and I therefore feel bound to hold that he cannot do so.

Declaration accordingly.

Solicitors: *McMillan & Mott; Candler, Stannard & Co.; Knapp-Fisher, Wartnaby & Blunt, Blake & Redden.*

²¹ [1940] Ch. 864.

C. A.

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WAR DAMAGE COMMISSION.

1957

Jan. 28, 29.

Lord Evershed
M.R.,
Jenkins and
Ormerod L.JJ.

[1955 C. 5244.]

War Damage—Cost of works payment—"Made good"—Such payments determined in respect of damage to separate hereditaments—Redevelopment of several sites by construction of two large new buildings—Whether such redevelopment "making good" the damage—War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), ss. 5, 7, 8 (2) (3).

A number of small properties belonging to the appellant company suffered war damage, in respect of which the War Damage Commission determined that a payment of cost of works was appropriate. The company redeveloped the sites of the premises by constructing on part of the sites and on adjoining sites two large new buildings. The commission withheld the payment of cost of works on the ground that the redevelopment was of so substantial a nature that it could not be described as making good the damage by works which included alterations or additions to the hereditament, as required by section 8 (3) of the War Damage Act, 1943,¹ to qualify for a payment of cost of works:—

¹ War Damage Act, 1943, s. 8:
" (2) If the war damage is made good
" by reinstating the hereditament in
" the form in which it existed imme-
" diately before the occurrence of the

" damage, the amount of the payment
" shall be an amount equal to the
" proper cost of the works executed
" for the making good thereof. . . (3)
" If the war damage is made good by

Held, that it followed from the general language of sections 5, 7 and 8 of the War Damage Act, 1943, that "making good" in relation to war damage involved the notion of restoration and that there must be preserved in some sense the continuance as a discernible entity of the hereditament the war damage to which had to be "made good"; that "made good" in section 8 (3) was not intended to cover a redevelopment which was not equivalent to a restoration or reinstatement, with alterations or additions, but which in form and as to the site that it covered negated any continuity in the identity of the previously developed hereditament; that the test to be applied was a common sense one, namely, whether what had been or was to be constructed was the old developed hereditament with the war damage "made good," with alterations or additions, or whether it was something quite different; that applying that test there was in this case a substitution over the whole area of a thing in essence quite different, even though the purposes which it was designed to serve were the same as those served by the buildings formerly on the site, and, accordingly, the claimants were not entitled to receive a payment of cost of works.

Decision of Vaisey J. [1956] Ch. 607; [1956] 3 All E.R. 236 affirmed.

C. A.

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APPEALS from Vaisey J.²

These were five appeals heard together by the Court of Appeal from the decision of Vaisey J. on five originating motions.

On May 10, 1941, 10 properties, known respectively as 28, Fenchurch Street, 24, 25, 26 and 27, Rood Lane, 127, Fenchurch Street, 134 and 135, Fenchurch Street, and 3 and 4, Cullum Street, and situate in the City of London, suffered damage. The War Damage Commission determined that these 10 properties constituted five units or hereditaments for the purposes of section 5 of the War Damage Act, 1943, in respect of which a payment of cost of works was appropriate. Acting on that determination, the City of London Real Property Co. Ltd. (hereinafter called "the appellants") expended and were at the date of the hearing of these motions expending considerable sums on the erection of two new buildings which together covered parts of the sites of the 10 properties and extended over the sites of other premises which had been demolished, either as the result of enemy action or to make room for the new buildings. In a letter dated July 1, 1955, and written on

"works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed

"for the making good of the damage as falls within the permissible amount."

² [1956] Ch. 607; [1956] 3 All E.R. 236.

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behalf of the commission, it was stated, *inter alia*, that the commission could only conclude that each of the 10 properties would have become (i.e., as a result of the proposed redevelopment) an indistinguishable part of an entirely different property; and, on October 17, 1955, the commission, using the exact words of most of the rest of the letter of July 1, determined that "a comparison of the plans of the original properties "and of the proposed redevelopment shows so little correspondence between the old and the new that the commission find "it impossible to say of any of the original properties, including "[giving the appropriate description of the property in each one "of the five determinations], that the damage will have been "made good by works which include alterations or additions to "the hereditament." The facts are more fully stated in Lord Evershed M.R.'s judgment.

By these motions the appellants claimed the determinations to be wrong in law because: (1) section 7 of the War Damage Act, 1943, required the commission to make a payment of cost of works; (2) the commission had in fact determined to make that payment and communicated that determination to the appellants in 1948; (3) section 8 of the Act (referring to "making good" war damage by works which included alterations or additions) was relevant to the quantum but not to the kind of payment; (4) the commission's functions relating to the making of payments were required by section 20 of the Act to be executed in conformity with the public interest as respected (*inter alia*) town and country planning; (5) the Act contained no provisions limiting the extent of the alterations or additions which might be included in the works of making good war damage; and (6) the commission, in the events which had happened and having regard to the extent to which the appellants had acted on the commission's first determination, were estopped from varying that determination; and the appellants claimed, pursuant to section 32 of the Act, an order discharging the commission's determination of October 17, 1955, and a declaration that the appellants were entitled to receive from the commission in respect of the war damage to [giving the appropriate description of the property in each one of the five originating notices of motion] a payment of cost of works of an amount calculated in accordance with the provisions of the Act.

Vaisey J. upheld the determination of the War Damage Commissioners.

The City of London Real Property Co. Ltd. appealed.

Harold B. Williams Q.C., J. Ramsay Willis Q.C. and David Trustram Eve for the appellants. The appellants have spent considerable sums on the erection of new buildings to replace those damaged by enemy action on these sites. The War Damage Commission has determined that these buildings do not constitute a "making good" of that war damage within section 8 of the War Damage Act, 1943, and this because of the lack of similarity in design and site between the old buildings and the new. To meet the requirements of the planning authority, the development of each site has had to be altered from what it was before the war. Section 8 of the Act of 1943 provides two alternative ways of calculating a payment of cost of works: (1) where there is reinstatement in the original form; (2) where the damage is made good with additions and alterations. These are two different conceptions. If the making good is to be reinstatement, the whole proper cost of the work is payable. In subsection (3) of section 8, where the making good is with additions and alterations, the statute puts no limit on their nature or extent; it only imposes a limit on the amount of the sum to be paid. Whatever is done and whatever is spent, no more will be paid than the permissible amount.

What the appellants have done on these sites has been done under the control of the planning authority. The differences between the old buildings and the new has largely been brought about by the operation of the planning legislation. Section 13 of the Act of 1943 contemplates that a payment of cost of works may be appropriate, but the war damage is not made good, that is, where the owners agree that the war damage shall not be made good or the War Damage Commission is satisfied that the war damage should not be made good. In those cases there is no making good at all. That is not this case. Making good does not mean making good a particular building but making good the war damage. If, as a result of planning control, factory premises have to be replaced by flats, the landowner is entitled to a payment of cost of works in respect of the flats. There is a making good if several buildings are replaced by one building.

The Act should be interpreted on the footing that its terms are mandatory, and if the case is in the first instance one for a payment of cost of works, the Act does not authorize the commission to alter its decision; further, there is no statutory limit on the extent of the alterations and additions which may be made when war damage is made good. The contrary view means that there comes a point when reconstruction is not making good

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within section 8. It should be possible on a consideration of the statute to say when this point is reached. It, however, lays down no principle in this matter. It should not be left to the commission. The result of their determination may be that the owner who puts up a modern building is prejudiced in comparison with one who rebuilds a jumble of pre-war buildings. The commission erred in law and this appeal should be allowed. [Reference was made to *Paddington Borough Council v. War Damage Commission*.³]

Michael Rowe Q.C. and *Denys Buckley* for the War Damage Commission. In the Act of 1943, making good is making good the war damage to the hereditament. The hereditament must be what is defined as the hereditament in section 5 (1) of the Act. The determination relates to units. The appellants contend that there is no limit to the alterations which may be made. Sites may be amalgamated and there need be no continuity of identity. Section 8 requires some continuity. The landowner is not given a free hand. If this had been the intention the Act would have said so. Some limitation must be imposed on what can be done in making good war damage. The limitation is that there must be continuity of identity. That is the test adopted by the commission. If that is the right test, there has been no error in law here. Here there is no continuity. Twelve properties have been amalgamated into one building.

With regard to planning: the powers under the Town and Country Planning Act, 1947, were conferred after the Act of 1943 came into operation and they do not affect the construction of the earlier Act. Sections 7 and 8 of the Act of 1943 have to be applied to the circumstances of each case. There is an implied limit in the section on the meaning of "making good." The commission applied the right test.

Harold B. Williams Q.C. in reply. It does not follow from the fact that the commission has power to determine the units of claim for war damage purposes that the making good of war damage must be limited to a unit.

LORD EVERSHERD M.R. The five separate appeals which we have taken together relate to certain properties, some of them north, and some of them south, of Fenchurch Street in the City of London, of which the appellants, the City of London Real Property Co. Ltd., are the owners, or in which they own substantial interests. I think I can best make clear the subject-matter

³ [1957] 1 Q.B. 294; [1956] 3 All E.R. 753.

in the several appeals by reference to two large plans in cases B. and D.

The plan attached to case B. shows the property or block of properties south of Fenchurch Street and bounded in part on the east side by Rood Lane. The whole block consists of different sites, upon which, before the occurrence of any of the war damage in question, were erected different and distinct buildings. The plan shows that as regards certain of the previous buildings—that is to say, Nos. 24 and 25 and 29 and 30, Fenchurch Street and No. 29, Rood Lane—any war damage that had occurred was of a relatively slight character, or had been, before any of the matters with which we are concerned, restored; and they, as such, play no part in the present appeals.

Another of the former buildings which constituted Nos. 26 and 27, Fenchurch Street is shown on this plan as having been a “total loss” within the meaning of the war damage legislation, and so to have been the subject at all times of a value payment. The remaining two sites are, first, No. 28, Fenchurch Street, and second, a block constituting Nos. 24 to 27, Rood Lane, known as Rood Chambers or Rood Lane Chambers. As regards each of these the damage, though serious, was not regarded as constituting total loss. In respect of each of those two pieces of property, therefore, the War Damage Commission had determined that the cases were appropriate for cost of works payments.

It will be borne in mind that the former of the two, No. 28, Fenchurch Street, was a single building with one street number for identification, and the unit in the second case, Nos. 24 to 27, Rood Lane, constituted in origin, or may have constituted, more than one separate tenement. It is a matter of significance that for the purposes in hand that last mentioned property, Nos. 24 to 27, Rood Lane, was determined by the commission to be, and has since been treated as, a single unit or hereditament. It is to the last two mentioned pieces of property—No. 28, Fenchurch Street, on the one hand and Nos. 24 to 27, Rood Lane, on the other—that two of the present appeals relate.

My analysis of the second block of property—that lying to the north of Fenchurch Street—is similar. It shows, that is to say, one piece of property called or formerly called No. 2, Cullum Street, which is uncoloured on the plan, and which for present purposes is neither the subject of determination for value payment nor for cost of works payment. It shows more or less in the centre a large block consisting of more than one site or unit for present purposes, as regards all of which it is stated that

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there had been a determination of total loss, so that the subject-matter there was at all times one for a value payment or value payments.

At the extreme south-east of this block of property are to be found first Nos. 125 and 126, Fenchurch Street, and, next to it to the west, No. 127, Fenchurch Street. The former property—Nos. 125 and 126, Fenchurch Street—does not enter into the subject-matter of the present appeals for reasons which will later emerge, but No. 127 does. At the other side—that is, on the west—there are to be found two properties, Nos. 134 and 135, Fenchurch Street, which again have been treated as a single unit or hereditament for war damage purposes, and in regard to which the determination of the commission had been not one of total loss, and therefore one appropriate for a payment of cost of works. Finally, in the north-west, Nos. 3 and 4, Cullum Street, again are taken together as constituting one unit or hereditament; and in regard to that hereditament also the determination had been not one of total loss, and therefore one appropriate for a payment of cost of works.

In pre-damage days what have been treated by the War Damage Commission as separate units or hereditaments constituted in fact separate and distinct buildings. All of them were used for substantially the same purpose; that is to say, they were all of them office buildings, but subject to this, that on the ground floor, in some cases at least, there were shops.

What has now happened in relation to these two blocks is that in the case of the block lying to the north of Fenchurch Street there is now in course of erection (if not completed) on what was the site of all these properties a single new building, in design, appearance and character wholly different from the buildings which formerly were found there. So far as the site is concerned, the new edifice comprises substantially less than the whole of the buildings which were either “totally lost” or were determined to be the subject of a payment of cost of works, or were neither the one nor the other. There now will be, or there is, on the site vacant space which may be used for access or for car parks; but in the centre the edifice rises in the form of a rectangular tower to a height of some 200 feet and containing 15 floors, far in excess, both in height and in the number of floors, of anything that was found there before. To make possible the new erection, every building which was there before, including those which had not been substantially damaged or which, having been damaged, had been repaired or “made good,” has been or

has to be wholly demolished. We were told further that inside the edifice on the separate floors there is or is to be no division corresponding either to the old divisions between the former individual properties or to the divisions of the tenements on the ground, the idea being that the tenants, who will take parts of the new building, will be able to have partition walls put on the floors in the positions which will suit their particular requirements. It is also part of the scheme that in certain parts of the building, lavatory and similar accommodation, may be provided to serve the needs of all the occupants of the entire structure.

To that general statement, however (and I am still dealing with the properties to the north of Fenchurch Street), there is one exception. The building that was Nos. 125 and 126, Fenchurch Street, in the south-east corner of the total block has been replaced by another building, which is not at all comparable in height to the central tower, and which is, moreover, quite distinct from the rest of the new building as a whole, in that it is wholly severed therefrom by party walls.

The old building was occupied for shop purposes by Alexander Clark, and I understand that the new building will also be occupied by that same firm. But the new building extends over a site area larger than that occupied by Nos. 125 and 126, Fenchurch Street in the old days. It comprehends a substantial part, more than half, of the adjacent site to the west, No. 127, Fenchurch Street, as it formerly was, and also a piece not so large, but not negligible, of the site to the north which was formerly known as No. 7, Fen Court.

As regards Nos. 125 and 126 and also 127, Fenchurch Street, the War Damage Commission had determined that the cases were appropriate for making payments of cost of works; and so far as Alexander Clark's premises (if I may so describe them in their reconstituted form) are concerned, the War Damage Commission have not at all resiled from that view. They have paid, or are prepared to pay, the appropriate cost of works payment for that part of the building, treating it rightly or wrongly (and it does not matter for present purposes) as being the same building, the same developed hereditament, as it formerly was with the war damage to it made good with alterations and additions—the additions including, of course, the pieces taken out of the adjacent sites.

The result is that there is before us no appeal relating to Nos. 125 and 126, Fenchurch Street. The relevant appeal is confined to the piece which is left of No. 127, Fenchurch Street,

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now incorporated in the large structure which I have described. I need not take time in a similar description of and reference to the new structure which has been or is being put up upon the site to the south of Fenchurch Street. The new structure, as in the case of the property north of Fenchurch Street, occupies on the surface of the ground appreciably less than did all the old hereditaments taken together. The new building is in style quite different from the separate structures that formerly existed; is of a typically modern type. But it does not approach so near to the skies as does the central tower to the north of Fenchurch Street. I must not be taken to be leaving out of account Mr. Harold Williams's point that each of these appeals has to be considered individually; and I shall presently say something on that aspect of the cases.

What has happened, and what has given rise to these appeals, is this: notwithstanding that originally the War Damage Commission had said that these five properties were appropriate for the making of payments of cost of works, it is now said by the commission that the new structures erected, or in course of erection, are of such a nature that payments of cost of works cannot and should not after all be made; on the ground that, in the event, these new structures do not constitute a "making good" of the war damage to the hereditaments in question within the meaning of the war damage legislation; and (it is said, in reliance on section 13 of the War Damage Act, 1943), that the proper course for the War Damage Commission is, in respect of these five former hereditaments, to make now value payments.

The cases were taken upon originating motion before Vaisey J. pursuant to the powers contained in section 32 (3) of the War Damage Act, 1943, from which it is quite apparent that the complaint made against the War Damage Commission's decision or decisions must be complaints involving questions of law. That is not disputed by Mr. Williams, for the appellants, who (putting it briefly) but I hope fairly, to his argument, said: The question of law involved is that in reaching this last decision—that is, the decision under section 13 not to make payments of cost of works after all—the War Damage Commission has made an error in law, in that it has wrongly construed the vital phrase in the War Damage Act, 1943, "making good the war damage." The error, Mr. Williams says, consists in imposing, in effect, a limitation upon the terms of the Act which the language used does not justify, and particularly upon the terms of section 8, to

the effect that "making good war damage" excludes a reconstruction or development of a hereditament of so substantial a character that, though the reconstructed building comprehends the old unit, and as redeveloped serves the same general purpose and character as the old developed unit, nevertheless the old unit is so submerged in the larger whole that the identity of the old unit is altogether lost, and the new edifice cannot be regarded (and no part of it can be regarded) as representing the old developed unit with the war damage to it "made good" with additions and alterations. It is said by Mr. Williams that that view—the imposition by the War Damage Commission of that limitation upon the terms of the section—is not justified as a matter of law.

In the course of the argument, I put his case to Mr. Williams, and he accepted it, in these terms: "What we have done is to "make good the damage by adopting a development on each of "the sites which in purpose and general character is the same as "was the purpose and general character of the old hereditaments, "but which in style and lay-out conforms to modern uses, and "particularly to the requirements of modern planning legislation: and such a making good is within the scope and contemplation of section 8 of the Act." I must say at once that I am unable to agree that there has here been the error of law which Mr. Williams alleges. I think that the War Damage Commission did not misdirect themselves, or proceed upon any wrong view of the real meaning of the vital sections of the Act.

In order to lay the foundation for that conclusion I must refer to certain sections of the Act. I again remind myself that, as Mr. Williams rightly pointed out, it is not necessary that all the appeals must be answered in the same way. There may well be a difference in degree, when you apply the language of the sections to what were the five relevant former units or hereditaments. I have already referred to the site occupied by the business under the name of Alexander Clark, and it is convenient to refer at this point to No. 28, Fenchurch Street, being one of the properties lying to the south of Fenchurch Street. In that case, save for a negligible widening of Fenchurch Street, which has taken into the street part of the site of the old property, the entire area of the old building has been incorporated into, and is part of, the new structure. Everything that was formerly No. 28, Fenchurch Street (except for the little strip in the road), will now be found at its appropriate place inside the new structure built in Fenchurch Street. The case of No. 28, Fenchurch Street, to

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that extent and to that degree, therefore, may be said to differ from the case of No. 127, Fenchurch Street, the greater part of the old site of which has now been incorporated into Alexander Clark's business, so that, so far as the relevant appeal is concerned, we are dealing with a section only of the former hereditament, less than half its former area. But bearing these differences in mind, I have for my part come to the conclusion that it is really impossible to say, as regards any of these former five units or hereditaments: "Here is the old unit or hereditament. Here it still is, and the war damage to it has been "made good with alterations or additions." I think, as a matter of common sense, you could not now identify any of the old units and make sensibly that statement about it. Putting it quite briefly, its incorporation as a part of a much larger, and quite different single whole (involving the total demolition of all that was there before, damaged or undamaged, restored or unrestored) is something which extends far beyond anything that could reasonably be called additions or alterations to that which formerly was or stood upon the old unit.

I now make my reference to the War Damage Act, 1943, itself, and I turn at once to section 5 in Part I of the Act. By that section it is provided, that, for the purposes of war damage under this legislation, property is to be dealt with "in such "units as the commission may determine"; and a unit is in the Act called a hereditament. It may consist, and frequently does consist, of a developed unit—that is to say, buildings as they stand upon a particular piece of ground; and for the purposes of the legislation the buildings which may be comprised in a single unit will not necessarily correspond with the identity or title of the ground upon which they happen to stand, but will or may depend rather upon the way in which they are together used.

I have already mentioned that the various sites with which in the five appeals we are concerned constitute what were determined by the commission to be five distinct units or hereditaments, the commission acting under their powers in section 5; and Mr. Williams concedes that the commission in that respect had a discretion, which involved matters of fact only, and which is not subject to review in this case, or indeed in the courts at all.

I pass to section 6 merely to state that by that section it is provided that, in respect of war damage, two classes of payment may be made, a value payment on the one hand, and a payment of cost of works on the other; and it is notorious that a payment

of cost of works to the owner is the more beneficial payment to receive.

Section 7 states the circumstances in which a value payment or a payment of cost of works may respectively be appropriate. It suffices to say that a value payment under this section is payable where the commission determine that there has been a total loss. In other cases, the payment appropriate to be made is a payment of cost of works. It was a cardinal part of Mr. Williams's argument that the terms of section 7—which require payments of cost of works in cases other than those of total loss—are mandatory.

It will be recalled that in all the five cases with which we are concerned there was an original determination by the commission of a payment of cost of works. But as regards the argument just mentioned it is to be borne in mind that the mandatory requirement (if such it be) in section 7 is expressed to be subject, among other things, to the terms of section 13. I want, however, to make particular reference to subsection (2) of section 7. It provides, so far as relevant: "War damage to a developed hereditament shall be deemed to involve total loss if, and only if, it is such that the proper cost, ascertained" at the date mentioned "of such works as would be required for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage would be likely to be more than the difference between" (putting it quite briefly) the value of the property as it would be if no war damage had occurred, and the value of the site as it was left after the war damage.

From that reading (and the subsection has a further significance to which I shall come back) it will be seen that the words "total loss," though constituting a convenient formula, might, to the uninitiated reader, be perhaps misleading. You are dealing with a building on the land, and the conception of total loss which you can readily apply to a ship or a motor-car is not so easily applicable to a building, and a piece of land on which a building stands, which in one sense can hardly ever be said to be totally lost. I can think of many instances of war damage, which it was an unhappy experience to see, but there was always something left of what had been struck. But "total loss" is not so much a description of the result of bombing, as an artificial test for determining whether one or other of two kinds of payment should be made.

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Before I make my further point on subsection (2) I will read so much of section 8 as is necessary. Subsection (2) of that section says: "If the war damage is made good by reinstating "the hereditament in the form in which it existed immediately "before the occurrence of the damage"—and I pause to say that that, of course, is an echo of the phrase I have read from section 7 (2)—"the amount of the payment shall be an amount "equal to the proper cost of the works executed for the making "good thereof." There then follows a proviso which permits the omission of certain features of the former building in the case of reinstatement where the omission does not detract from or increases the value of the reconstructed building.

There then follows this phrase: "In this Part of this Act the "expression 'the permissible amount'"—which has not, I think, hitherto occurred—"means, in relation to a payment of "cost of works, the amount that is payable by virtue of this "subsection or that would have been payable if this subsection "had had effect in relation to the payment." I am sorry to say that for my own part I remain somewhat in the dark as to the precise intent of those words; but it is not in dispute before us that the effect of them is to make the amount that would be payable, as provided by the earlier parts of the subsection, a kind of ceiling which is not to be exceeded when we come to the appropriate payments under the next subsection, which I now read: "(3) If the war damage is made good by works which "include alterations or additions to the hereditament, the amount "of the payment shall be an amount equal to so much of the "proper cost of the works executed for the making good of the "damage as falls within the permissible amount."

It will be observed (and again this was a point in the forefront of the appellants' argument) that though reinstatement is expressly mentioned in section 7 (2) and section 8 (2), it is not mentioned in subsection (3) of the latter section; and so it was contended that subsection (3) goes far beyond what could be called sub modo reinstatement, and covers the substitution of an edifice quite different in its structure and scope or in the area which it covers so long as it replaces (and, perhaps, so long as it serves the same uses as) the former building. The words "making good" are given some definition in section 123 (1) of the Act where it is said that: "'making good' includes, in "relation to war damage, demolition or clearance requisite as a "preliminary to, or in the course of, the making good thereof."

Save, therefore, that the words are meant to include the preliminary work to the "making good"—whatever the "making good" may mean—I doubt whether that definition materially assists in the present cases.

Notwithstanding the contentions of Mr. Williams, I cannot in its context construe subsection (3) of section 8 as having the wide scope which Mr. Williams would find there. I think that if you pay regard to the general language of sections 5, 7 and 8 it follows that "making good" involves the notion of restoration and at least must preserve in some sense the continuance as a discernible entity of the unit or hereditament, the war damage to which has to be "made good." I think, accordingly, that the "making good" cannot be held in subsection (3) of section 8 (and that it certainly cannot be held in any other part of the section) as intended to cover a redevelopment which in no sense is equivalent to a restoration or reinstatement with alterations or additions, but which is something, as to form and as to the site that it covers, that negatives any continuity in the identity of the previously developed hereditament.

At this stage I will make my other references to the Act, namely, section 13 and section 32. Section 13, which was the one invoked by the War Damage Commission to these cases, provides that: "Where the appropriate payment in respect of 'war damage to a hereditament would apart from this provision 'be a payment of cost of works'—and that is the case in all the five cases with which we are concerned—" if the Commission "are satisfied that" *inter alia* "the circumstances are such that the damage or any part of it will not in fact be made good, they may, notwithstanding any previous determination of the 'kind of payment to be made in respect of the damage to the 'hereditament, make a payment or payments' of the kind set forth, which, so far as we are concerned, will be exclusively value payments in respect of each of the five sites. As I have earlier indicated, the commission have now said, and this is the decision which is sought to be impugned: "We are satisfied "that no part of the war damage to these hereditaments will in "the event be 'made good' as those last two words are to be "construed in sections 7 and 8 of the Act."

Section 32 (1) provides that subject, *inter alia*, to the provisions of subsection (3) "any question arising in giving effect to the "provisions of sections 6 to 8 . . . or 13" and certain other sections "of this Act . . . shall be determined by the commission." Subsection (3) says: "If any person is aggrieved by

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“ a determination of the commission of any question which is
“ under this section to be determined by them, other than a
“ determination ”—which does not arise here—“ he may appeal
“ therefrom on any question of law to the High Court.” It is
by virtue of that power that the appellants appealed by originating
motion to Vaisey J., and they must, as is conceded, show that
they are complaining of an error of law on the part of the
commission.

There is one other point that I ought to mention, namely,
the impact of town planning legislation. In the notices of
motion reference is made to town planning legislation; and it is
undoubtedly the fact that new buildings in Fenchurch Street—
or indeed anywhere else in the whole country—have to conform
to the planning regulations which may apply under the existing
town planning legislation. The broad scope of planning which
covers all development in the whole country owes its source
to the Town and Country Planning Act, 1947. At the time of
the Act of 1943 the scope of planning authority was less wide;
but it is right to say that the existence of planning powers must
be taken to have been known by Parliament; and it is, therefore,
one of the contentions of the appellants here that you ought not to
construe “ making good ” so narrowly as to exclude works done
which town planning, in its application to the particular site,
might require.

In my judgment the answer to that point can be shortly
stated: non constat by any means that in every case planning
authority would stand in the way of a development which was
in substance no more than a reinstatement with or without
additions and alterations; and it seems to me impossible to say
that, in the light of the existing planning legislation, a construc-
tion of the words “ making good ” which the judge favoured
(and which I favour) makes the provisions for a payment of cost
of works in any sense futile or nugatory.

In speaking as I have done of the identity of the former site,
or of the buildings on it, which in some sense must be preserved,
I am not, of course, at all suggesting that for a payment of cost
of works the legislature contemplated only an actual and exact
restoration of what was there before, or the building of a replica
of the former edifice. It is plain that the payment of cost of
works is not confined by the terms of subsections (2) and (3) of
section 8 to such a strictly limited scope of rebuilding.

In the recent case of *Paddington Borough Council v. War Damage Commission*,¹ before this court, it was pointed out, though for other purposes and in another context, that if Parliament had intended to make war damage payments referable only to what was substantially exact reinstatement, the forms of words which would have been found in appropriate places in the Act would be to the effect "as if the war damage had not occurred." I am certainly not going to attempt, between, on the one hand, an exact reincarnation of the old building and, on the other, the appearance of a phoenix which, arising from the ashes of May, 1941, has in appearance and in detail no features which can be related to the ancestry of its parent bird or parent birds, to define or indicate where exactly the line should be drawn. The matter is, as I think, and as those responsible for the administration of this Act in their Practice Notes have suggested, one of applying common sense tests; the question being, as I see it—certainly in this case, and I imagine in most cases—that when you have seen what has been done, or what is going to be done, you ask yourself: Is this thing that is constructed, or that is going to be constructed, the developed unit, the old hereditament, with the war damage to it "made good" with alterations or additions, or is it something quite different? When you apply that simple common sense test to all these five cases, you are, I think, inevitably bound to answer the question thus, that you cannot in any case discern at all the old hereditament. What you find is something far removed from the "making good" of the damage done to (say) No. 28, Fenchurch Street, with additions or alterations thereto. It is in truth the substitution over the whole area of a thing in essence quite different, even though the purposes which it is designed to serve are the same as those served formerly.

I therefore think that Vaisey J. rightly concluded the matter when he affirmed the way in which the case had been put by the War Damage Commission in their letter of July 1, 1955. "From the point of view of physical characteristics" said that letter, "a comparison of the plans of the original properties and of the proposed redevelopment shows so little correspondence between the old and the new that the commission find it impossible to say of any of the original properties (with the possible exception of 125/126 Fenchurch Street) that the war damage will have been made good by works which include alterations or additions to the hereditament, but can only conclude that

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"each will have become an indistinguishable part of an entirely "different property." I think that view of it was correct, and I think it therefore quite impossible to say that, in so directing themselves, the commission fell into any error of law.

I add finally that if the test which I have tried to formulate is applied in connexion with the most practical matter involved, namely, payment of cost of works, it will be seen how truly the matter has been stated in the letter which I have quoted. Payments of cost of works are not made until the work has been done. If this be a case within the scope of subsection (3) of section 8, then some part of the total cost of building (and I take the northern building by way of an example) this large structure with its 200 feet high central tower must be identified as constituting the "making good" of the particular damage done to the particular units, parts but not all of which are included in the new structure. As Jenkins L.J. asked during the argument: How is it to be discovered what is the appropriate part of the total cost which should be treated as the cost of works payable in respect of the "making good," strictly, of the former hereditaments? I daresay that the ingenuity of quantity surveyors and others might find the answer. But to my mind the problem set of discovering the sum is so far removed from the realities of the case as to emphasize what I have already tried to express, namely, that in truth, within the meaning of the words used, what has been done has gone far beyond a "making "good" of the damage to these hereditaments with alterations or additions.

I would dismiss all the appeals.

JENKINS L.J. I agree. The sole question in these appeals, as I understand them, is whether the new buildings that have now been erected, or are now in the course of erection, on the two sites north and south of Fenchurch Street can be said to constitute the making good of war damage "by works which "include alterations or additions to the hereditament" within the meaning of the opening words of subsection (3) of section 8 of the Act.

First, I would refer to section 6 of the Act, and I would observe that a cost of works payment is thus defined in subsection (1) (a) of that section: "Subject to the provisions of this "part of this Act, a payment to be made thereunder shall be of "one or other of the following kinds, that is to say, (a) a payment of cost of works, being a payment of an amount

“determined by reference to the cost of works executed for making good the damage, as provided by section 8 of this Act.”

Apart from any further light thrown upon it by section 8, that language seems to me to suggest that the phrase “making good the damage” is used in the ordinary sense of that phrase; and that the payment of cost of works is to be made to the owner, or the person having the appropriate interest in the hereditament, where it can be shown that there has been war damage to the hereditament and that works have been executed for making good that damage. To quote a simple instance: A man’s roof is blown off by a bomb. He puts it back again. He has suffered war damage, and he has made it good, or, in other words, put it right, by restoring the roof, and he will be entitled (subject to the provisions of the Act) to the cost of the works executed for that purpose. One starts, therefore, with a phrase which suggests the repair of an existing thing, an operation which, when completed, will leave the thing identifiable as the thing it was before, but in a repaired state.

Passing to section 8 one finds that by subsection (1): “Subject to the provisions of this Part of this Act, the amount of a payment of cost of works shall be computed as provided by subsections (2) to (4) of this section.” Then two distinct classes of case are dealt with. First of all, by subsection (2): “If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof.” I think I can pass over the rest of subsection (2). Then subsection (3) is the other case: “If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount.” I need not pause to embark upon a discussion of the exact meaning of the expression “permissible amount,” which for the present purpose can be sufficiently described as an amount equal (subject to certain adjustments) to the proper cost of the works executed for the making good of the war damage.

The appellants rely on the contrast between these two distinct classes of case. The first is that of reinstatement, and

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reinstatement no doubt connotes the repairing of the hereditament so as to leave it, broadly speaking, in the same state and form in which it existed before it was damaged. But subsection (3), say the appellants, is of much wider import, for it extends to all cases in which the war damage is "made good" by works which include alterations or additions to the hereditament. They say that there is no limit on the meaning of the words "alterations or additions," or, at all events, that there is no limit set to the meaning of those words in express terms, and that there is no sufficient reason for implying any limit.

In my view it is impossible to give subsection (3) of section 8 that unrestricted meaning in the context in which it appears. Although it refers to alterations or additions, it refers also to the process of "making good." The case to which it relates is the case in which war damage is "made good" by works which "include" alterations or additions. It is to be observed not merely that the phrase "made good" with its suggestion of repair is used, but that the alterations or additions are to be included, in the work of "making good." It seems to me that this points to the conclusion that the effect of subsection (3) is to make it clear that the payment of cost of works will still be payable if the war damage has been "made good," even though the work done to "make good" that damage goes beyond mere reinstatement, and includes certain alterations or additions to the premises. In that state of affairs, the legislature thought it reasonable that the payment of cost of works should nevertheless be made, provided that it did not exceed the permissible amount; and that calculation, as I understand it, was designed to ensure that the alterations and additions, which have nothing to do with the war damage, should not be taken into account so as to increase the amount of the payment of cost of works.

As I have said, I find it impossible to place upon subsection (3) of section 8 the unrestricted meaning for which the appellants contend. If that meaning were the right one, then the subsection would apply in every single case in which there has been war damage, and some building or other has been put up to replace the damaged building, however different in design or mode of construction or use or siting the new building may be from anything which existed before. Various extreme examples were put in the course of the argument. It was suggested (and I think agreed) that it would be impossible to say that a church damaged by enemy action could be said to be "made good" by the

erection upon its site of a block of flats or a garage, or some wholly different structure of that sort.

Accordingly, those extreme cases must be ruled out. But once one comes to the conclusion that extreme cases must be ruled out, the question whether any given case falls within subsection (3) of section 8 must become a question of fact and degree; and if it is a question of fact and degree, then, having regard to the terms of subsection (3) of section 32 of the Act in regard to appeals, the decision of the commission, being a decision of fact, is one which cannot be reopened on appeal.

In my view there is no ground for holding that in arriving at the conclusion at which they did arrive the commission misdirected themselves or committed any error of law. No error of law could, as I see it, be imputed to them on a point of this kind, unless it could be said that there was no evidence to support their conclusion. My Lord has dealt fully with the facts, and I will not repeat his references to them; but it appears to me that the new buildings in this case were so different from anything that had ever before existed on those sites that it is quite impossible to say that there was no material upon which the commission could properly hold that this was not a "making good" with additions or alterations, but the substitution of entirely new and different buildings for those which formerly stood on the sites.

Reference was made in the course of the argument to the Practice Notes issued by the commission under the War Damage Act, 1943, for the guidance of those charged with the administration of the Act. These notes, of course, are not authoritative, but as Vaisey J. observed, they have been compiled with great care, and I think that the observations made in these notes on the question: "What is making good by works which include alterations or additions?" are valuable observations for the guidance of such persons. In his judgment Vaisey J. quoted this passage in particular²: "The test which the commission will apply in order to decide whether works which have been executed, or which it is proposed to execute, constitute making good the war damage or involve the creation of a different property has been set out in Practice Note XIV, First Series, Second Edition, but is repeated here for convenience. It is, 'Looking at the works executed, can the property be fairly described as still the same property as before the war damage, although altered or added to?' And it is to be answered on

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² [1956] Ch. 607, 613; [1956] 3 All E.R. 236.

C. A. "common sense lines." Vaisey J. approved that passage as
1957 correctly stating the test to be applied and I fully share his
approval of it.

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I have endeavoured to state briefly in my own words my reasons for rejecting this appeal, but might well have confined myself to saying that for the reasons given by Vaisey J. and in the judgment just delivered by the Master of the Rolls, I entirely agree that it fails and should be dismissed.

ORMEROD L.J. I agree, and having regard to the reasons which have been given in the previous judgments, there is very little that I wish to add.

The question in each of these appeals is the same, and that is whether the War Damage Commission has applied the right principle of law in coming to the determination that the appellants are not entitled to be paid on a cost of works basis for the buildings which are being erected on the respective sites in question. The answer to that question depends very largely on the construction of sections 7 and 8 of the War Damage Act, 1943. Mr. Harold Williams has submitted that section 7 is mandatory, and that the effect of section 8 is to do nothing more than to set up a means of computation of the payment of the cost of works, and in no way limits the work in respect of which, or the buildings in respect of which, such a payment of cost of works can be made.

For my part I cannot accept that contention. I agree with the previous judgments, and with the judgment delivered by Vaisey J. If such a construction has been intended, there seems in the first place to be no reason why section 8 should have been set out as elaborately as it has. It would have been sufficient to provide that a sum not larger than the permitted amount should be payable in all cases where section 7 applied, and work could be paid for on a cost of works basis. The fact that section 8 has been set out in detail, as it has, clearly indicates that such was not the intention of the section. For my part, I am satisfied that the intention of subsection (3) of section 8 was that there should be, to some extent at least, a reinstatement of the hereditament in the form in which it was before the war damage was done.

It is true that the word "reinstatement" is not used in subsection (3) of section 8, but the whole tenor of the section, I think, must imply that that is the case. The words of the subsection—if the war damage is "made good" by works not which consist of alterations or additions to the hereditament, or words

of that kind, but by works “which include alterations or “additions to the hereditament”—make it clear that there must be limitations to the type of work which can be done in order to secure a payment on a cost of works basis. As I see it, it is for the commission—using the words in their plain meaning—to ask themselves in each case whether the damage to the hereditament has been “made good,” albeit by the inclusion of alterations and additions. In these cases, if they asked themselves that question, the answer was bound to be “No.” What appears to have happened here is that a number of adjacent sites have been cleared and an entirely new building or set of buildings erected on them bearing no resemblance in style or in any other respect to any buildings which were there before the war damage was done.

For these reasons I am satisfied that the commission directed itself properly in coming to the determinations against which these appeals have been made, and I agree that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *Forbes & Son; Treasury Solicitor.*

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[1957 C. 734.]

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Mar. 8, 26.
Harman J.

Restrictive Trade Practices—Conditions as to resale prices—Individual enforcement — Notice of restriction — Express notice essential — Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2, c. 68), s. 25.

The plaintiffs, manufacturers of toilet preparations, sought an interlocutory injunction to restrain the defendants from selling one of their products below the price fixed by the plaintiffs' price list, of which the defendants had received a copy. The price list was sent out in November, 1956, after November 2, when section 25 of the Restrictive Trade Practices Act, 1956,¹ took effect. The defendants

[Reported by JENNIFER WEST, Barrister-at-Law.]

¹ Restrictive Trade Practices Act, 1956, s. 25: “(1) Where goods are “sold by a supplier subject to a “condition as to the price at which “those goods may be resold, either “generally or by or to a specified “class or person, that condition

“may, subject to the provisions of “this section, be enforced by the “supplier against any person not “party to the sale who subsequently “acquires the goods with notice of “the condition as if he had been “party thereto. (2) A condition

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denied that they had express notice that the products in question actually sold by them were subject to the price condition, since they had no knowledge of the plaintiffs' secret marks and no notification from the wholesalers that these articles were manufactured and sold after November 1:—

Held, dismissing the motion, that section 25 must be strictly construed since it restricted the rights of free trading, and "notice" accordingly must be limited to express notice, which the defendants did not have.

MOTION.

The plaintiffs, manufacturers of "Brylcreem," sought an interlocutory injunction to restrain the defendants, who were cut price dealers and who had sold, it was conceded, in February, 1957, medium-sized pots of "Brylcreem" at a price of 2s. 6d. a pot, from reselling by their servants or agents until judgment or further order any goods which were in the plaintiffs' price list and which were sold by the plaintiffs subject to the condition of which the defendants had notice, at a price lower than the fixed retail price. The price list, which stated that medium sized pots of "Brylcreem" should be retailed at a price of 2s. 10d. a pot, was sent out and a copy received by the defendants in November, 1956, after the Restrictive Trade Practices Act, 1956, had taken effect on November 2. The defendants had, however, no knowledge of the secret mark upon the pots sold by them by which the plaintiffs were able to establish that these pots were manufactured and sold after November, 1956, nor were they informed by the wholesaler, from whom they bought, that these articles were subject to the price condition. They, therefore, contended that they were entitled to sell at the price of 2s. 6d.

Charles Russell Q.C. and *P. J. Stuart Bevan* for the plaintiffs.

G. T. Aldous Q.C. and *Charles Lawson* for the defendants.

The Restrictive Trade Practices Act, 1956, has no retrospective

"shall not be enforceable by virtue
"of this section—(a) in respect of
"the resale of any goods by a person
"who acquires those goods otherwise
"than for the purpose of resale in
"the course of business, or by any
"person who acquires them, whether
"immediately or not, from such a
"person; (b) in respect of the resale
"of any goods pursuant to an order
"of any court, or by way of execu-
"tion or distress, or by any person
"who acquires them, whether imme-
"diately or not, after such resale....

"(4) . . . the court may, if it thinks
"fit, upon proof that goods sold by
"the plaintiff have been resold by
"the defendant in breach of any such
"condition, grant an injunction
"restraining the defendant from
"reselling in breach of any such
"condition any goods already sold
"or thereafter to be sold by the
"plaintiff, whether of the same
"description as the goods proved to
"have been resold as aforesaid or of
"any other description."

effect and section 25, therefore, only applies to articles manufactured and sold after November 2, 1956, when the Act took effect. The defendants did not buy direct from the plaintiffs and they had no actual notice that these goods were manufactured and sold after that date. Accordingly, they had no notice that these goods were sold subject to price restrictions.

Section 25 must be strictly construed, since it encroaches on the rights of free trade; "notice" means express knowledge. The equitable doctrine of constructive notice does not affect commercial transactions: *Greer v. Downs Supply Co.*,² per Scrutton L.J. There is analogy here with limited licences granted in patent cases: in *National Phonograph Co. of Australia v. Menck*³ it is stated that notice must be express and impositions on a subsale are not to be assumed. The duty is on the plaintiffs to see that the defendants have express notice and the defendants are not put upon inquiry.

Charles Russell Q.C. in reply. It is not essential that the defendants should have actual knowledge that these particular goods were subject to the price restriction, since they have notice that the plaintiffs' goods were sold subject to this condition as set out in their price list. If it be essential that in every case the defendants have express notice, then section 25 has no effect.

[HARMAN J. It is perfectly possible for the plaintiffs to mark their goods with some letter and refer to that in the price list.]

The defendants are put upon inquiry to discover whether or not the condition applies to particular goods. Parliament has determined that it is in the common interest to enforce a retail price and effect should be given to this.

HARMAN J. This is an application by the plaintiffs to enforce a novel provision contained in section 25 of the Restrictive Trade Practices Act, 1956. That section seeks to reverse the law as it stood before and to make restrictive conditions run with chattels. Of course, in certain cases restrictive conditions have run with land, but this extends that doctrine to chattels. It is, of course, necessary that the persons taking a chattel, being *ex concessis* not persons in privity with the plaintiff, should have notice; and I do not think the doctrine of *Tulk v. Moxhay*¹ can apply to sales of chattels. Taking with notice, I think, means "taking with express knowledge," and not "being put "on inquiry and being therefore fixed with what would have been

² [1927] 2 K.B. 28, 35.

¹ (1848) 2 Ph. 774.

³ [1911] A.C. 336; 27 T.L.R. 239.

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“ascertained if the inquiry had been pushed to its reasonable “limit.” *Greer v. Downs Supply Co.*,² cited to me by Mr. Aldous, seems to show that the courts have refused to apply that kind of doctrine to traders and trading matters.

The defendants have known at all material times, so far as this motion is concerned, that in and since November of last year, when the section in question came into force, the plaintiffs have had issued prominently a price list which draws attention to the new Act and says: “All goods marketed by us are sold subject to “observance of the fixed retail prices published in our current “price list.” The defendants knew of this document and, therefore, were perfectly well aware that the fixed retail price which they must observe, or which persons marketing the plaintiffs’ goods must observe, was 2s. 10d. They sold this pot of “Brylcreem” at 2s. 6d. nevertheless, and it is said that they have committed a breach of the provisions of the statute.

The defendants argued that they did not know that the particular pot was sold or manufactured since November, 1956, since they had no knowledge of the secret mark by which the plaintiffs established that in fact this pot of “Brylcreem” was manufactured in February, 1957, nor could they know how old or how new were the stocks of the wholesaler from whom they bought; they had no express notice of the condition because there was nothing to show them the date on which the pot of cream was filled.

I observe that on the front of the list of prices it is stated: “Acceptance of the goods by the wholesaler or retailer shall be “deemed agreement by that trader to notify any customer to “whom he sells other than by retail of the above conditions”; in other words, the persons to whom, or the firms to whom, the plaintiffs sold were under an obligation to pass that information on, and so provide the necessary notice which brings the section into operation. Whether that was done in this case I do not know; nor do the plaintiffs know. It may be that, when this action comes to trial, by means of discovery or interrogatories, it will be possible to find out; it may be possible to prove that such a notice was or was not given. All I can say at the present moment is that that information is missing.

Mr. Russell, for the plaintiffs, said that, if the section were construed as the defendants would have it construed, it would make nonsense of the Act. I have heard that plea before, and

² [1927] 2 K.B. 28, 35.

I am not impressed by it; I do not believe it to be true. It would be perfectly possible for manufacturers to show on their preparations that they were made after or before a certain date; and, at any rate, the passage of time will cure that particular defect, if defect there be. But I observe that it is a section limiting the freedom of trade, and, therefore, although I am bound to give it that effect which the language of it expresses, I am not prepared to go beyond that and stretch it so as to produce an effect which the express language does not warrant. "Notice" in my opinion means knowledge, and for the purposes of this motion I do not think that the plaintiffs have satisfied the court that the defendants had notice that this particular jar of "Brylcreem" was sold subject to the condition, although they had notice, no doubt, of the existence of the condition, in that any articles put out subsequently to it were subject to it. They had not, nevertheless, knowledge that this jar of "Brylcreem" was necessarily manufactured subsequent to the notice, and I think that they were entitled not to ask anything further, if that is what they chose to do.

Solicitors: McKenna & Co.; Thornton, Lynne & Lawson.

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In re DELIUS, DECD.
EMANUEL v. ROSEN.

[1956 D. No. 1007.]

1957
Mar. 12.

Roxburgh J.

Charity—Education—Music—Bequest to advance work of musical composer—Bequest by composer's wife—Validity.

The wife of the composer Frederick Delius, by her will dated May 27, 1935, gave her residuary estate to her trustees on trusts for the advancement of her husband's musical works.

By clause 12 thereof she declared: "My trustees shall apply the "royalties income and the income of my residuary trust fund for "or towards the advancement in England or elsewhere of the "musical works of my late husband . . . under conditions in which "the making of profit is not the object to be attained and which "might be economically impossible by any concert operatic or other "organization (as my intention is to create a charitable trust "within the legal meaning of that phrase) by means of (1) the "recording upon the gramophone or other instrument for the "mechanical reproduction of music of those works of my late "husband . . . suitable for reproduction (2) the publication and

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"issue of a uniform edition of the whole body of the works of
"my late husband or any part thereof or the publication and issue
"of any separate work . . . (3) the financing . . . of the per-
"formance in public of . . . [his] works. . . ."

Clause 14 was in these terms: "If during the lifetime of my
" . . . brother it shall at any time appear to my trustees that
"the trusts and object of clause 12 . . . have been fulfilled to their
"fullest possible extent and there remains nothing further that
"my trustees can undertake in connexion with the furtherance or
"perpetuation of the works of my late husband then and in such
"case I give my residuary trust fund unto my . . . brother."

She died on May 28, 1935. Delius died on June 10, 1934. On
a summons taken out by the trustees to have determined whether
the trusts in clause 12 were valid charitable trusts, it was not in
dispute that the standard of Delius's works was so high that the
question as to his adequacy as a composer did not arise:—

Held, (1) that the purpose of the trust was to spread the
knowledge and appreciation of Delius's work throughout the world,
and the fact that pleasure was an incident of that appreciation
or that the effect of the trust was also to enhance the reputation
of Delius did not prevent it being a valid charitable trust.

Royal Choral Society v. Inland Revenue Commissioners [1943]
2 All E.R. 101 applied.

(2) That the trust was not invalidated by clause 14, under which
a financial benefit might have arisen to the residuary legatee, since
that clause could never become effective, for it could not ever be
said that nothing remained to be done to further or perpetuate
his works.

ADJOURNED SUMMONS.

Jelka Delius, wife of the composer Frederick Delius, who
died on June 10, 1934, made her will on May 27, 1935; she died
on May 28, 1935.

By clauses 8 and 9 of her will the testatrix devised and
bequeathed to her trustees, Philip Emanuel, a solicitor, and
Barclays Bank Ltd., "all copyrights and interests in copyrights
"of the musical works of my late husband to which I am
"entitled . . . I direct that the net royalties and profits or
"moneys in the nature of royalties or profits . . . shall be
"income and shall be held upon the trusts contained in clause 12
"of this my will."

Clause 12 was in the following terms: "My trustees shall
"apply the royalties income and the income of my residuary
"trust fund for or towards the advancement in England or
"elsewhere of the musical works of my late husband Frederick
"Delius under conditions in which the making of profit is not
"the object to be attained and which might be economically
"impossible by any concert operatic or other organization (as

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“ my intention is to create a charitable trust within the legal
 “ meaning of that phrase) by means of (1) the recording upon
 “ the gramophone or other instrument for the mechanical repro-
 “ duction of music of those works of my late husband which in
 “ the opinion of my trustees and their advisers are suitable for
 “ reproduction (2) the publication and issue of a uniform edition
 “ of the whole body of the works of my late husband or any
 “ part thereof or the publication and issue of any separate work
 “ hitherto unpublished under the editorship of Sir Thomas
 “ Beecham, Bart., provided that the publication and issue of
 “ any separate work hitherto unpublished shall be made only
 “ with the consent in writing of Sir Thomas Beecham and (3) the
 “ financing in whole or in part of the performance in public of
 “ the works of my late husband.”

By clause 13, the testatrix directed that her trustees “ shall
 “ before carrying out the trusts contained in clause 12 hereof
 “ obtain and faithfully observe the advice and opinion of Sir
 “ Thomas Beecham and Frederick Austin or the survivor
 “ thereof (so long as they or such survivor shall be alive) with
 “ respect thereto and I direct that my trustees shall act upon
 “ such advice or opinion accordingly.”

Frederick Austin was now dead, but the survivor, Sir Thomas
 Beecham, was still able to assist in this respect.

Clause 14 provided: “ If during the lifetime of my said
 “ brother [Dr. Frederick Rosen] it shall at any time appear
 “ to my trustees that the trusts and objects of clause 12 of this
 “ my will have been fulfilled to their fullest possible extent and
 “ there remains nothing further that my trustees can undertake
 “ in connexion with the furtherance or perpetuation of the works
 “ of my late husband then and in such case I give my residuary
 “ trust fund unto my said brother.”

The testatrix and her husband had no children; the persons
 entitled to claim any part of her estate which might be undis-
 posed of were: (1) the testatrix's nephew, Dr. Georg Rosen, who
 was entitled to the estate of his father, Dr. Frederick Rosen, who
 died on November 27, 1935; and (2) the testatrix's niece, Anne
 Marie Rosen, the only child of the testatrix's other brother,
 Hermann Rosen, who died in 1902. The niece was now
 and had at all material times resided in Germany, and the
 Custodian of Enemy Property claimed to be interested in any
 part of the testatrix's estate that passed to her as next-of-kin.

The trustees by this summons asked the court to determine
 whether the trusts contained in clause 12 of the will of the

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testatrix were valid and effectual charitable trusts; and if the answer to that question were in the affirmative, that, if necessary, a scheme might be directed.

T. A. C. Burgess and Deborah Rowland for the trustees of the will.

Charles Fletcher-Cooke, for the testatrix's nephew, did not argue the question.

N. C. Browne-Wilkinson for the Custodian of Enemy Property. The bequest in clause 12 is not charitable; if it were merely for the advancement of music, it could not be opposed as non-charitable, but the object set up by this will is not merely for the advancement of music; it is to enhance the reputation of one particular composer, and that point is emphasized by the terms of clause 14. The principal object is the advancement of the works of Delius and not the benefit of the public. The words used by the testatrix are "furtherance" and "advancement," and they are always used in relation to the works of her husband. The dominant purpose is the enhancement of his reputation and not the education of the public; the primary object therefore is not a charitable trust.

The fact that in clause 14 the testatrix foresaw that the objects of the trust could be fulfilled in the lifetime of her brother shows that an educational trust is not the dominant motive. It is difficult to see how an educational trust could ever be fully achieved, as there would always be some persons to whom the works of Delius would have to be introduced.

Mere perpetuation is not in itself a charitable purpose, but only so far as the object perpetuated is charitable. There is no doubt that the manner in which the testatrix wished to carry out this trust would be of some benefit to the public, but that does not mean that that was the dominant purpose: *Royal Choral Society v. Inland Revenue Commissioners*.¹ Where the object of a trust can be carried out both as a charitable purpose and as a private non-charitable purpose the court has to decide which is the dominant purpose. In all charities it is possible that some benefit may result to an individual; whether a case falls within the charitable class or not is a question of fact, save in so far as it depends on the construction of written documents. On the words used by the testatrix the primary object is on the face of it the advancement of the works of Delius.

¹ [1943] 2 All E.R. 101, 103.

The testatrix says that the making of a profit is not the object to be attained, because she wishes it to be a charitable trust. That shows that her conception whether or not a trust was charitable was whether or not a profit accrued; but the question whether or not this is a charitable trust cannot be influenced by the testatrix's views that it is charitable.

[ROXBURGH J. You say that her express intention to create a charitable trust is irrelevant?]

Yes; in this particular trust it is put in to show that the object is not merely for commercial gain.

It is not suggested that Delius is not a composer of merit, but it would be undesirable and dangerous for the court to decide that this was a charity on the ground that Delius was a good composer. If the court were to consider the merits and demerits of artistic works it would be opening the way to judgments on aesthetic matters.

[ROXBURGH J. You could have a body of competent opinion, as in patent law.]

I do not say that the court could not reach a decision on this point; since the decision in *National Anti-Vivisection Society v. Inland Revenue Commissioners* ² it cannot be contended that the court cannot make a qualitative judgment, but it is undesirable that it should decide cases on the basis of aesthetic merit. No decision goes so far as to say that the advancement of the works of a particular composer is a charity; a gift which operates only for the gratification of the donor's vanity is not charitable: *Mellick v. The President, etc., of the Asylum*.³ A trust merely to enhance someone's reputation is not charitable, even though it may result in the education of the public; thus, even if the advancement of the works of Delius were *prima facie* charitable, and it was one of the principal objects of the trust, nevertheless the gift would fail if one found on examination that the real principal purpose was to carry out a non-charitable purpose: *Royal Choral Society v. Inland Revenue Commissioners*.⁴

A further reason why this is not a charitable trust is because there is a possible financial advantage accruing to an individual from the operation of clause 14. There is here an element of gain. The trustees are given a discretion in certain circumstances to terminate the trust.

[ROXBURGH J. You cannot paraphrase it like that.]

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² [1948] A.C. 31; 63 T.L.R. 424;
[1947] 2 All E.R. 217.

³ (1821) Jac. 180.

⁴ [1943] 2 All E.R. 101.

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The whole of this clause is prefixed by the words "if during "the lifetime of my . . . brother it shall at any time appear to "my trustees . . ." If the trustees at any time reach a conclusion that nothing more remains to be done about the works of Delius they can pay the money over to the brother of the testatrix. They might be mistaken, but they cannot be questioned if it is done to the best of their belief.

Denys Buckley for the Attorney-General. The true purpose of this trust is to spread and establish the knowledge and appreciation of Delius's work amongst the public. One is much assisted by the fact that he was a great composer. A trust for the establishment and appreciation of any kind of art is a valid charitable trust on the lines laid down by Lord Greene M.R. in the *Royal Choral Society* case⁵; the court has to decide on the facts of the case whether it is a charity.

It is submitted on the decisions in *In re Shakespeare Memorial Trust*⁶ and *In re Shaw's Will Trusts*⁷ that this trust, which is to increase the public appreciation of works of aesthetic value, must be charitable. The fact that they are the works of one composer and not of several does not matter. To find out what the trust is one must look at the language used by the testatrix and see what has to be done; the motive of the donor is irrelevant: see Tudor on Charities, 5th ed., p. 9. If a gift is by its nature charitable, the court cannot inquire into the motives of the donor to find out whether her object was a charitable one: *Hoare v. Osborne*.⁸ [*In re Price*⁹ was also referred to.]

With regard to the position under clause 14, the copyright was a wasting asset and after 50 years it would not exist. If the works of Delius prospered, it would never happen that there was nothing that the trustees could do to promote his works; but if they did not and his reputation grew stone cold, they might think in the circumstances that nothing further could be done to perpetuate his works. In these circumstances no benefit would accrue to an individual by the performance of the trust. Alternatively, this clause is wholly misconceived and could never operate at all.

ROXBURGH J. read the relevant clauses of the will and continued: First of all, I have to decide what is the purpose of this

⁵ [1943] 2 All E.R. 101.

⁸ (1866) L.R. 1 Eq. 585, 588.

⁶ [1923] 2 Ch. 398; 39 T.L.R. 610, 676.

⁹ [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.

⁷ [1952] Ch. 163; [1951] 2 T.L.R. 1249; [1952] 1 All E.R. 49.

trust. In arriving at a conclusion on that point, I must have regard not only to the language in which the purpose is expressed (and, indeed, that is of itself reasonably clear) but also to the means which are indicated for achieving that purpose, which make the position even clearer. It seems to me that in very truth the purpose is the spreading and establishment of knowledge and appreciation of Delius's works amongst the public of the world. It is, indeed, remarkable to what extent that objective has been achieved in the 21 years or so since the widow died. The copyrights in Delius's works were valued at the date of her death at £1,483, and at that time formed a comparatively small portion of his residuary estate. The royalties received in the year ending April 5, 1936, amounted to £103, in the year 1946 they amounted to £2,233, and in the year 1956 they amounted to £7,278; which is no doubt largely to be attributed to Sir Thomas Beecham.

The position is now that certain of Delius's works are so well known that no guarantee is required by the recording companies in respect thereof, but the trustees are now advised that some of the lesser-known works which were recorded in the early history of the trust should be re-recorded if the work of the trust can continue to be carried on. Sir Thomas Beecham has been engaged for some years on the task of editing the whole of the compositions of Delius, with a view to the publication and issue of a uniform edition of the whole body of his musical works in accordance with the provisions of clause 12 of the will, but the printing and publication of the major portion of this edition has been held in abeyance pending the decision of this court whether after the period of 21 years from the death of the testatrix the trusts declared in clause 12 constitute valid and effectual charitable trusts, or are void as infringing the rule against perpetuities or otherwise.

I have stated what I understand to be the purpose of the trusts, and the question is whether that purpose is charitable in the eye of the law? I can do no better in this connexion than to read certain passages from the judgment of Lord Greene M.R. in *Royal Choral Society v. Inland Revenue Commissioners*.¹ There are, of course, certain points which necessarily occur to the mind in connexion with a musical composition. It might be suggested as regards some music, at any rate, that its purpose was limited to giving pleasure, and as regards all music it must be said that it gives pleasure. That is a feature about

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music. When I say "all music," I mean all that can be truly called music. Indeed, a lot of pleasure is derived by some from something which can hardly be truly called music, but, at any rate, pleasure is a circumstance intimately connected with music. But that in itself does not operate to destroy the charitable character of a bequest for the advancement of the art of music. I adopt, with great satisfaction, the words of Lord Greene²: "Curiously enough, some people find pleasure in providing education. Still more curiously, some people find pleasure in being educated: but the element of pleasure in those processes is not the purpose of them, but what may be called a by-product which is necessarily there." That seems to me to be all that need be said about the aspect of pleasure connected with the music of Delius.

Lord Greene proceeded: "Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching—as I understood him, teaching in the sense of a master teaching a class." Then Lord Greene said³: "I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being." Those words have been freely adopted in subsequent cases, and I adopt them and also hold that they are directly applicable to this trust.

I do not find it necessary to consider what the position might be if the trusts were for the promotion of the works of some inadequate composer. It has been suggested that perhaps I should have no option but to give effect even to such a trust. I do not know, but I need not investigate that problem, because counsel who have argued before me have been unanimous in the view that the standard of Delius's work is so high that that question does not arise in the present case.

² [1943] 2 All E.R. 101, 104.

³ Ibid. 105.

The point which has been made—and it is one of interest and importance—is, that first of all this trust is not a trust for the promotion of music in general but the music of a particular individual composer. That could not of itself vitiate the charitable nature of the trust, because, after all, aesthetic appreciation of music in a broad sense can only be derived from aesthetic appreciation of the works of a large number of composers. It is the aggregate of the work of a large number of composers which is the basis of the aesthetic appreciation, and, therefore, if it is charitable to promote music in general it must be charitable to promote the music of a particular composer, presupposing (as in this case I can assume) that the composer is one whose music is worth appreciating.

In order to make that plain, I would refer to *In re Shakespeare Memorial Trust*,⁴ where the charitable trust was, to put it shortly, to promote the works of Shakespeare. I cannot conceive that anybody would doubt that a trust to promote the works of Beethoven would be charitable, but the real strength of the point put in this case arises from the fact that this trust was created by the widow of Delius, and nobody would doubt that, amongst the many motives which actuated her, affection for her deceased husband was to be found. But one must be careful to distinguish motive from purpose, because motive is not relevant in these cases except in so far as it is incorporated into the purpose. Considering the purposes, it is possible to approach the purposes upon the hypothesis that their intention was, as Mr. Browne-Wilkinson put it, to enhance her husband's reputation.

This is, of course, rather subtle. It is a question which is the cart and which is the horse, because, of course, the more aesthetic appreciation of Delius's music is achieved the more Delius's reputation will necessarily be enhanced. The two things fit together, and there is no doubt whatever that both objects have in fact already been to a large extent achieved. But, in my judgment, it is not fair to approach the problem from that point of view. I think that there is every reason to suppose that the testatrix took the view, and was well advised to take it, that if the work of Delius was brought before the public in an efficient manner, the aesthetic appreciation of the public would grow and, inherent in that growth, would be the enhancement of Delius's reputation, which was in itself a desirable thing, and I for my part refuse to disentangle it. There is no reliable evidence

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⁴ [1923] 2 Ch. 398; 39 T.L.R. 610, 676.

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on which I can disentangle it. What is quite clear to me is that these purposes would plainly be charitable if for the name "Delius" the name "Beethoven" were substituted and, in my judgment, they do not cease to be charitable because in this context the name is "Delius" and not "Beethoven."

I have still to consider the difficulty of clause 14. Mr. Browne-Wilkinson laid stress on this clause from two points of view. He said, first of all, that it indicated that the purpose was merely the enhancement of the husband's reputation. Otherwise, he said, there never could be any occasion for the gift over. That argument I cannot accept because it seems to me that the clause does not fit, whichever view you take of the trusts. It does not fit if one looks at the paramount purpose as being the aesthetic education of the public, and it does not fit if one looks at the purpose as being the enhancement of the husband's reputation. Therefore, so far as that is concerned, I do not think that it either helps or hinders his argument, but he does raise a much more formidable point. Of course, a charitable trust must not have inherent in it the potentiality of individual profit for a non-charitable beneficiary. That is mentioned by Lord Greene in the *Royal Choral Society* case,⁵ and is, indeed, self-evident. If it were possible for this *prima facie* charitable trust to redound to the personal benefit of a residuary legatee, then it would be impossible to say that it was a charitable trust, and it does not matter for this purpose that the brother unfortunately died long ago, because he might not have done so and that fact, therefore, cannot affect the true construction of the will.

But, construe it as I may, I cannot make sense of it on any view. First, there is the question (which is not overwhelmingly important, but which has some importance) as to what it means. "If during the lifetime of my . . . brother it shall at any time appear to my trustees that the trusts and object of clause 12 of this my will have been fulfilled to their fullest possible extent and there remains nothing further that my trustees can undertake in connexion with the furtherance or perpetuation of the works of my late husband." I do not know whether that second sentence is intended to begin with the word "that" so as to give the trustees a discretion over the second part, as undoubtedly they have over the first part, or not. Grammatically, it seems to me to be perfectly logical and accurate, and so construed they have not a discretion. It is a statement of fact.

⁵ [1943] 2 All E.R. 101.

But the testatrix probably intended them to have a discretion, and in order not to bother over what is a small matter I would assume, without deciding it, that they have a discretion.

Still it is a discretion that they have to exercise bona fide, or at least they would have had to exercise bona fide if the circumstances could have arisen, but I can think of no circumstances in which it could ever be the bona fide opinion of the trustees that they could not undertake anything further. It does not say "could not properly undertake" or "could not reasonably undertake," or anything of that sort. It is "could not undertake," and, as far as I can see, however distinguished an author or composer may be, there never comes a point when nothing can be done in connexion with the furtherance or perpetuation of his works. Indeed, in a sense, the more distinguished the author becomes the more can be done to further or perpetuate his works. It is a sort of cumulative process, and there is now much more, in a sense, that can be done than could have been done 20 years ago, because there are so many more potential listeners than there were then.

Mr. Buckley suggested that perhaps what is intended in this clause is complete failure to popularize any of Delius's music anywhere. That may have been so at the time of the widow's death when the value of the copyright was small, but so far as that is concerned that would not vitiate the trust, because that only means that there would not have been a profit on the trust for the residuary legatee, but a loss on the trust, and, therefore, all that I have to say is that it is impossible to see how there could possibly be a profit to the residuary legatee from this prima facie charitable trust. I am utterly unable to see how there could possibly have been a profit to the residuary legatee because the more the value of the copyrights grew the more could be done to further or perpetuate the works of Delius.

In this connexion I would refer to *In re Shakespeare Memorial Trust*,⁶ where one has the literary figure who became the greatest in English literature, and after some 300 years or so there is plenty to do to further or perpetuate his works. The process knows no end, and although Delius, I have no doubt, does not rank with Shakespeare, I feel without the least doubt that his reputation will grow, and that it will become more and more possible to do things to further or perpetuate his works. I come, therefore, to the conclusion that no financial benefit could ever

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have arisen to the residuary legatee from the *prima facie* charitable trusts, and that they are therefore charitable.

I do not propose to direct a scheme, but I will give liberty to apply for a scheme, because so long as Sir Thomas Beecham is able and willing to continue the work which he has done so successfully for the last 21 years or so, I feel no doubt that he is better able to do it than anybody else in England; but, of course, if he should find it too heavy a burden for him, then I think a scheme would be eminently desirable.

Declaration accordingly.

Solicitors: *W. R. Bennett & Co.; Holland & Co.; The Solicitor, Board of Trade; Treasury Solicitor.*

I. G. R. M.

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In re PEACOCK, DECD. MIDLAND BANK
EXECUTOR AND TRUSTEE CO. LTD. v. PEACOCK.

Upjohn J.

[1956 P. No. 2460.]

Will—Lapse—Class gift—Public policy—Manslaughter of testator by wife—Bequest of residue to wife, son and stepson “in equal shares “as tenants in common”—Whether a class gift—Whether wife’s share divisible between son and stepson or went as on intestacy—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 15.
Public Policy—Administration of estates.

A testator gave the residue of his estate “Upon trust for such “of them my said wife . . . my stepson . . . and my son . . . as “shall survive me and attain the age of twenty-one years and if “more than one in equal shares as tenants in common absolutely “and if one only then the whole to that one.”

He was feloniously killed by his wife, who was convicted of his manslaughter. It was not disputed that her share of residue lapsed owing to her felony, and the question on the present summons was whether her share was divisible equally between the stepson and son, or went as on intestacy to next-of-kin, so that the son received two shares and the stepson one share:—

Held, (1) that this was a gift to a group, but for the purposes of lapse it had all the characteristics of a class gift.

In re Woods [1931] 2 Ch. 138 applied.

(2) That the rule that in the case of a class gift the share of a person excluded did not lapse but went to swell the shares of the

remaining members of the class applied where a member of a class was prevented from taking on the ground of public policy, and the wife's share was accordingly divisible in moieties between the stepson and the son.

Fell v. Biddolph (1875) L.R. 10 C.P. 701 and *In re Coleman and Jarrom* (1876) 4 Ch.D. 165 applied.

Dictum of Fry L.J. in *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, 158 considered.

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ADJOURNED SUMMONS.

A testator, Harold Peacock, was killed feloniously by his wife on December 16, 1955. She was indicted for his murder at York Assizes and found guilty of manslaughter on February 14, 1956, and sentenced to three years' imprisonment.

In the circumstances the widow could take no benefit under his will or on his intestacy, and she had not been made a party to this summons.

The testator made his will on January 25, 1955, and gave to his wife his personal chattels and £1,000 free of duty; those gifts had been treated as falling into residue. He gave his residuary estate on the usual administration trusts and gave the net proceeds as follows: "Upon trust for such of them my said wife Gladys Peacock my stepson Stanley Abbott Peacock and my son Douglas Peacock as shall survive me and attain the age of twenty-one years and if more than one in equal shares as tenants in common absolutely and if one only then the whole to that one . . ."

The defendant, Douglas Peacock, was the only child of the testator (by an earlier marriage) and he was nearly 19 years of age. Subject to attainment of full age therefore this defendant would be entitled to any estate not disposed of by the will of the testator. The question on the summons was whether in the events which had happened the testator's residuary estate was divisible equally between his stepson, Stanley, and his son Douglas, or went as to one-third to his stepson, one-third to his son and one-third as on intestacy.

R. S. Lazarus for the executor.

Raymond Walton for the testator's stepson. The effect of the wife's inability to take under her husband's will by reason of her felony is that her share of the residue is divisible equally between his son and stepson. There have been a number of cases where the question has arisen under an intestacy, but no cases under a will, where it had to be determined precisely what

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happens on the exclusion of the felon from taking under the will. The same principles should apply as on intestacy. The gift of residue to the wife, son and stepson is a class gift: *In re Woods*.¹ The testator clearly intended that they should take as a group, and that has all the effects of a class gift; the rule against lapse should therefore apply and the wife's share should go to the other members of the class: *In re Woods*.¹

The consequences of the death of the testator in the circumstance must be either (1) that the wife is struck out of the will completely, or (2) one must read the words of the will as if the gift of residue were preceded by the words "if not disqualified by felony," or (3) one must treat the matter as if there had been an express revocation on the ground of public policy of the benefits conferred on the felon.

[UPJOHN J. I should have thought that the effect was the same as if the felon had witnessed the will.]

That may not be quite the right way of looking at it, for the testator intended these persons to take as a group, and it must be considered as a class gift.

In *In re Callaway*,² where the daughter had murdered her mother, and was the sole beneficiary under the mother's will, the whole of the mother's estate passed as on intestacy to her son, including the moiety to which the daughter would have been entitled had the mother died intestate. Vaisey J. said that the son had to be treated as the only member of the class of the mother's issue who was not disqualified from taking, although his Lordship said that in the absence of any authority he would have treated the daughter's moiety as undisposed of and passing to the Crown as bona vacantia: see also *In re Pollock*.³ Whichever way this question is approached, the result in each case must be the same: that the gift of one-third of the residue goes equally between the son and stepson.

Michael Browne for the testator's son. There is an intestacy in respect of the wife's share, so that the son is entitled to two-thirds of the residue. The matter must be considered by stages; one must first construe the will and then apply that construction in the light of the wife's disability to take her share on account of her felony. The principle that felons are disqualified under a rule of public policy from taking any benefit under the estate of the person whom they have feloniously killed is considered

¹ [1931] 2 Ch. 138.

³ [1941] Ch. 219; 57 T.L.R. 359;

² [1956] Ch. 559; [1956] 2 All [1941] 1 All E.R. 360.
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both in Jarman on Wills, 8th ed., p. 115, and Theobald on Wills, 11th ed., p. 116. The principle also applies to a killing by manslaughter: see Theobald, p. 116. That rule of public policy applies equally to benefits under the trusts declared by the Administration of Estates Act, 1925, where the victim has died intestate, as to benefits arising under a will: see *In re Sigsworth*⁴ and *Cleaver v. Mutual Reserve Fund Life Association*,⁵ per Fry L.J.⁶ In *Beresford v. Royal Insurance Co. Ltd.*⁷ Lord Atkin said⁸ that the principle of this rule was that a man should not be allowed to have recourse to a court of justice to claim a benefit from his crime, whether under a contract or under a will.

This disqualification is in the nature of a personal disability, and is similar to the disqualification arising under the Wills Act, 1837, where a beneficiary witnesses a will. As to the origin of the rule, see Jarman, p. 110. Thus, in *Aplin v. Stone*,⁹ although section 15 of the Wills Act avoided (inter alia) a devise to the wife of an attesting witness, quoad her interest, it did not strike the devise out of the will. It was held that the will had to be construed before section 15 was applied, and that after the will was construed, applying section 15, the wife's interest was rendered null and void and passed as on intestacy. That case is on all fours with the present; the gift is to the wife of a one-third share of residue if living at the death of the testator, and the wife, being alive at the date of the testator's death, attained a vested interest in her share which became null and void because of her conviction, but that result does not alter the construction of the will.

This is not a class gift as in *In re Woods*,¹⁰ where all the persons stood in the same relation to the testator, and since this is not a class gift, the widow's share lapses and passes as on intestacy: *In re Midgley*.¹¹

Walton in reply. The effect of a gift in this form is that one reads into the will the words "if duly qualified to take," and if a person is a felon, he is disqualified from taking. The share of a member of a class who is disqualified goes to swell the shares of the rest of the class: *Fell v. Biddolph*.¹² That case was commented on by Jessel M.R. in *In re Coleman and Jarrom*,¹³

⁴ [1935] Ch. 89; 51 T.L.R. 9.⁹ [1904] 1 Ch. 543.⁵ [1892] 1 Q.B. 147.¹⁰ [1931] 2 Ch. 138.⁶ Ibid. 158.¹¹ [1955] Ch. 576; [1955] 2 All⁷ [1938] A.C. 586; 54 T.L.R. 789;

E.R. 625.

[1938] 2 All E.R. 602.

¹² (1875) L.R. 10 C.P. 701.⁸ [1938] A.C. 598.¹³ (1876) 4 Ch.D. 165, 173.

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who said that wherever there is a gift by a testator to a class, the rule is that those members of the class capable of taking take the whole fund, the gift being construed as an intention by the testator that the class shall take so far as the law allows. Although this is actually a gift to a group, and not strictly speaking a class gift, it is correct to call it a class gift: *In re Woods*.¹⁴

Cur. adv. vult.

March 21. UPJOHN J. having stated the facts read the following judgment:

Fortunately for me the Crown has expressly disclaimed any interest in the estate as bona vacantia, and for the purposes of this case I can banish the doubts which recently assailed Vaisey J. in *In re Callaway*.¹

The question therefore is this: does the share of residue which the widow would have taken apart from her felony lapse and fall to be dealt with as upon an intestacy so that subject to attaining 21 Douglas will take two shares and Stanley Peacock one share, or is the residuary gift to be treated as equivalent to a class gift and if so, in the circumstances of the case, ought the usual rule as to class gifts to be applied so that lapse is negatived and residue is divisible among those members of the class capable of taking, i.e., into moieties subject to Douglas attaining full age?

Apart altogether from the wife's felony the construction of the will to my mind gives rise to no difficulty. It may not strictly be a class gift, for the wife, stepson and son all respectively stand in a different relation to the testator, but so far as lapse is concerned the testator has made it abundantly clear that this gift is tantamount to a class gift. It is a gift to a "group," to adopt the word used by Maugham J. in *In re Woods*,² but for the purposes of lapse it has the characteristics of a class gift. Thus if, for example, the wife had predeceased the testator, residue would be divisible into moieties and there would have been no lapse of her one-third share. The case is completely covered by *In re Woods*,² and indeed is stronger than that case, for that there is no room for lapse in the event of a beneficiary predeceasing the testator is shown by the use of the words "and "if one only then the whole to that one."

¹⁴ [1931] 2 Ch. 138.

² [1931] 2 Ch. 138.

¹ [1956] Ch. 559; [1956] 2 All E.R. 451.

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That does not solve the problem, however. On the one side it is argued that the case must be treated as a class gift, and as the wife has failed to qualify she is struck out of the will just as though she had predeceased the testator. On the other hand it is argued that you must look at the actual facts; you then find that in fact the widow survived and takes a vested share of residue, but as she is disabled from taking, that share is necessarily undisposed of.

The actual point is apparently free of direct authority, but apart from some persuasive authority which I mention later there would in my judgment be much to be said for the second view. As Fry L.J. said in *Cleaver v. Mutual Reserve Fund Life Association*³: "the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime." You must therefore see what claim the felon can establish, and when it is established public policy steps in as a personal bar; applying that to this case, the felon by reason of survivorship establishes a claim to membership of the class or group and therefore to a vested share of residue; but being debarred from taking that share it is undisposed of. Thus in the analogous case of disqualification of a legatee by reason of having witnessed the will, Swinfen Eady J. in *Aplin v. Stone*⁴ pointed out that⁵ "The proper way of dealing with these cases is first to construe the will, and ascertain what interests are given, and then to apply section 15 of the Wills Act." In that case there was a gift held, upon construction, to be to A. if living at the death of the testator's wife and otherwise to her children, and it was held that A. having witnessed the will was disqualified and there was an intestacy.

On the other hand, a different result has been reached under section 15 of the Wills Act where the gift is to a class and is not in form alternative, and the cases which I must now mention were distinguished in *Aplin v. Stone*⁶ on that ground.

It is quite clear that in the case of a class gift the share of the person excluded, by reason of having witnessed the will, does not lapse but goes to swell the shares of the remaining members of the class. The reason for that was explained by Coleridge C.J. delivering the judgment of the Court of Common

³ [1892] 1 Q.B. 147, 158.⁴ [1904] 1 Ch. 543.⁵ Ibid. 548.⁶ [1904] 1 Ch. 543.

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Pleas in *Fell v. Biddolph*.⁷ He said⁸: “By the operation of the statute, the names of Thomas and Sarah (assuming the latter to be an attesting-witness, as the plaintiffs contend) are struck out of the will: they are rendered incapable of taking, and therefore in our judgment are not to be reckoned in the class ascertained at the testator’s death.” He summarized the law as follows⁹: “Upon the whole, we are of opinion that, upon the current of authority and the reason of the decisions, so far as we can deduce it, the devise was to a class, and to such a class as would take not separate shares the value of which would vary with their number, but in undivided shares, the whole portion devised, and that this is to be taken by those who at and after the testator’s death came within the limits of the class, and who were capable of taking.”

In *In re Coleman and Jarrom*¹⁰ Jessel M.R. was not concerned with a witness to a will, but he stated the rule against lapse in the case of class gifts in this way¹¹: “I think that the true rule is that those members of the class who are at the testator’s death capable of taking take, and that those who become incapable of taking—whether by dying in the testator’s lifetime, or by attesting the will, or by some other operation of law—do not take.” That rule is of perfectly general application, and I think I ought to apply it to class gifts where the law of public policy steps in to render a member of the class incapable of taking. It can, in my judgment, be no valid ground of distinction that this is a gift not strictly to a class but to a group. The application of the principle stated by Jessel M.R. merely means that the testator must be taken as having intended that only those of the group of his three named beneficiaries were to take as were capable of taking, with the consequence that, subject to Douglas attaining 21, residue will be divided into moieties, and I must declare accordingly.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie for Cook, Fowler & Outhet, Scarborough.*

I. G. R. M.

⁷ (1875) L.R. 10 C.P. 701.

⁸ *Ibid.* 709.

⁹ *Ibid.* 710.

¹⁰ (1876) 4 Ch.D. 165.

¹¹ *Ibid.* 173.

FOUR-MAIDS LTD. v. DUDLEY MARSHALL
(PROPERTIES) LTD.

1957
March 20.

Harman J.

[1957 F. No. 26.]

Practice and Procedure—Chancery Division—Mortgage—Legal charge—Mortgagee's summons for possession—Discretion to adjourn—Confining to mortgages repayable by instalments—R.S.C., Ord. 55, r. 5A. Mortgage—Possession, mortgagee's right to—Absolute right unless contract excluding it—No discretion to adjourn summons for possession—R.S.C., Ord. 55, r. 5A.

A mortgagee, unless precluded by some term expressed or implied in the mortgage, has a right at any time to go into possession of mortgaged property by virtue of the legal interest he has therein, whether or not any payment under the mortgage is outstanding.

The direction of the judges of the Chancery Division in the notes to R.S.C., Ord. 55, r. 5A, that on an application for possession the court has a discretion to adjourn the application from time to time, applies only in the case of mortgages repayable by instalments.

ADJOURNED SUMMONS.

By a registered mortgage dated February 17, 1956, Dudley Marshall (Properties) Ltd. charged property known as 6, White-chapel High Street, Stepney, in the County of London, in favour of the plaintiffs, to secure repayment of the sum of £6,000 on August 17, 1956, together with interest thereon payable half-yearly on August 17 and February 17 in every year. The charge provided that if the mortgagor should pay each instalment of interest within seven days after the day on which the same should become due, and should comply with his obligations thereunder, the principal moneys should not be called in before December 31, 1958.

The mortgagor was, at and ever since the execution of the charge, in possession of the mortgaged property. On July 17, 1956, the mortgagee gave the mortgagor a written statement of the amount of the instalment of interest which would become due on August 17, 1956. The mortgagor failed to pay the said instalment or any part thereof on or before August 17, 1956, or within seven days thereafter. On August 29, 1956, the mortgagee served on the mortgagor a written notice requiring payment forthwith of the said principal sum of £6,000 and interest. On September 19, 1956, the mortgagee issued a writ in the Queen's

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Bench Division claiming payment of the interest due under the mortgage. On September 27, 1956, the mortgagor paid the instalment of interest which became due on August 17. The whole of the principal money remained due.

By an originating summons in the Chancery Division under R.S.C., Ord. 55, r. 5A,¹ dated January 4, 1957, the mortgagee claimed possession of the mortgaged property. The master on February 22, 1957, made an order for possession to expire two months after service of the order. At the mortgagor's request the matter was adjourned into court.

Douglas Potter (with him *Muir Hunter*) for the mortgagor. A mortgagee who claims possession of mortgaged property must establish his right to possession. The remedies of mortgagees under R.S.C., Ord. 55, r. 5A, are not disputed, but the court has power in every such case to grant a mortgagor an adjournment; that appears from the practice directions given by the Chancery judges in respect of applications by originating summons for payment or possession under that rule. In *Hinckley and South Leicestershire Permanent Benefit Building Society v. Freeman*² Farwell J. held that the court had power to adjourn the matter for a definite period on such terms as it thought just after the mortgagor had made default; and in *Robertson v. Cilia*³ Upjohn J. held that the court had jurisdiction to adjourn the matter for a reasonable time. The master therefore has power to adjourn any application under rule 5A. In this case there are now no arrears, and the omission to pay interest was only for a few weeks.

¹ R.S.C., Ord. 55, r. 5A: "Any mortgagee or mortgagor, whether legal or equitable . . . may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may . . . be specified . . . that is to say . . . Delivery of possession (whether before or after foreclosure) to the mortgagee. . . ."

"Practice Directions. By the judges of the Chancery Division in respect of applications by originating summons for payment or for possession under Ord. 55, r. 5A. . . ."

"Relief Claimed. . . . When possession is sought and the defendant is in arrear with any instalments due under the mortgage . . . and the master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit, and if the defendant is in default of appearance direct the plaintiff's solicitor to communicate such terms to the defendant by letter."

² [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212.

³ [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651.

The court in the exercise of its power to grant an adjournment should do so for a reasonable period.

[HARMAN J. What do you say is a reasonable period?]

Two or three months after the expiration of the master's order.

Although there is a common law right to possession after the mortgage becomes payable, the authorities show that once one resorts to the court, then the court has a discretion for the protection of the mortgagor to adjourn the proceedings for a reasonable period. This is a case in which that discretionary power should be exercised for a reasonable period, i.e., two or three months from today or two or three months from the date of the master's order. [Reference was also made to *Hughes v. Waite*⁴ and *Alliance Perpetual Building Society v. Belrum Investments Ltd.*⁵]

M. O'Connell Stranders for the mortgagee. *Hinckley and South Leicestershire Permanent Benefit Building Society v. Freeman*⁶ and *Robertson v. Cilia*⁷ have no application because they related to instalment mortgages. The practice directions relating to applications under Ord. 55, r. 5A, also relate to instalment mortgages. The power to adjourn proceedings is not to enable the court to exercise it according to its fancy, but to enable it to ascertain the facts and then apply the law. Farwell J. recognized this in the *Hinckley* case.⁸ This is not a case of a mortgage repayable by instalments, and therefore these cases are out of the picture. The mortgagee has the legal estate and he is therefore entitled, in the absence of a stipulation to the contrary, at any time to enter into possession. A mortgagee is entitled to the protection given by that right: see Halsbury's Laws of England, 2nd ed., vol. 23, p. 322, paras. 486-488, and the *Hinckley* case.⁸ The mortgagee here has demanded possession and issued a writ; he is therefore entitled to it.

The present question bears some resemblance to that of possession between landlord and tenant. Thus, where the landlord's statutory right to possession was only permissive, it was held to be the duty of the judge to make an order for possession notwithstanding the permissive form of the section, which merely meant that possession must not be postponed more than was reasonable in the circumstances: *Sheffield Corporation v.*

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⁴ [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

⁵ [1957] 1 W.L.R. 720; [1957] 1 All E.R. 635.

⁶ [1941] Ch. 32.

⁷ [1956] 1 W.L.R. 1502.

⁸ [1941] Ch. 32.

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Luxford.⁹ See also *Jones v. Savery*¹⁰ and *Air Ministry v. Harris*.¹¹

Even if the court has a discretion, it is a judicial discretion which should only be exercised according to the legal circumstances of the case; that is on the footing that the mortgagee is here entitled to an immediate order for possession.

HARMAN J. This is an originating summons for possession. The plaintiffs, being proprietors of a legal charge on the register, have under section 34 (1) of the Land Registration Act, 1925, all the powers and rights of a legal mortgagee. This subject is one which is constantly being agitated in this court. I have had my attention called to some observations I made on it recently in *Hughes v. Waite*,¹ and even more recently in *Alliance Perpetual Building Society v. Belrum Investments Ltd.*,² which came before me on an application to commit the editor of the "Daily Mail" for comments on a mortgagee's action for possession of a sort exactly similar to the present. The comments and, indeed, the arguments of counsel for the newspaper showed an entire misapprehension of what an originating summons for possession is about. They all assumed that it involved some kind of default on the part of the mortgagor, but I said there, and I repeat now, that the right of the mortgagee to possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there is an attornment clause, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.

I think that the confusion which has arisen about this matter is a natural one stemming from the alteration of the rules in 1936. Before that date practitioners were familiar with the complaint of mortgagors that judgment had been signed against

⁹ [1929] 2 K.B. 180; 45 T.L.R. 491.

¹⁰ [1951] 1 All E.R. 820; [1951] W.N. 201.

¹¹ [1951] 2 All E.R. 862; [1951] W.N. 518.

¹ [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603.

² [1957] 1 W.L.R. 720; [1957] 1 All E.R. 635.

them in default in the Queen's Bench Division for possession, and that they had had no opportunity of stating their case and found an order made against them without proof of the mortgagee's rights. It was thought that, as in mortgage cases the mortgagee's other rights had to be dealt with in this Division, it was better that his right to possession should be dealt with here. Up to that time one could only ask for possession in the Chancery Division as part of an originating summons for foreclosure or of the other remedies of a mortgagee. R.S.C., Ord. 55, r. 5A, was amended and from that time the mortgagee could ask for possession alone. This was a novelty, but, as I recently pointed out, it has become a very fashionable form of relief because, owing to the conditions now prevailing, if it is desired to realize a security by sale, vacant possession is almost essential. Where, therefore, the mortgagor is in occupation, a summons for possession is taken out, and no other relief is sought, and where the mortgagee is in a position to exercise his power of sale, that is all the help he requires from the court.

The Chancery judges made a practice direction in 1936 which now appears in the note to R.S.C., Ord. 55, r. 5A, of the Annual Practice. That has led to a good deal of confusion, because when it is read without remembering the principles of the matter, it would appear that every time a mortgagee applies to the court the master, or rather the court, would look into the question of what payments had been made, how much arrears there were, and what were the prospects, and would adjourn the matter from time to time to give the mortgagor an opportunity of making his peace with his mortgagee. I have always been of opinion, and I remain of that opinion, that this practice is limited to what are by far the most frequent forms of mortgages, those whereby the principal, as well as the interest, are repaid by the mortgagor by commuted weekly or quarterly sums, and whereby the mortgagee precludes himself, so long as those weekly or other periodical sums are punctually paid, from going into possession. That is the way most people occupy their houses nowadays. Building societies are not desirous of going into possession, nor would they do business if they were able to go into possession whenever they liked. The whole object of building societies is to maintain the householder in possession of his house so long as he pays the instalments to the society, and these practice directions are directed to that matter. But in an old-fashioned type of mortgage, such as that in the present case, none of those considerations applies at all. The

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mortgagee can go into possession whenever he chooses, whether there are arrears or not, whether there is default or not.

The mortgagor said here that his default was of a very small order. So it was. If this were a case where there was discretion in the matter, I should feel that it was a hard case. But the mortgagor has entered into a contract with the mortgagee, and the mortgagee asks for his rights under the contract, and this court, in my judgment, has no power to refuse him those rights.

There was a provision in the mortgage that so long as interest was punctually paid the mortgage money would not be called in before December, 1958. But the mortgage interest was not punctually paid in August, 1956, and the mortgagee, as it was entitled by its contract to do, thereupon called in its mortgage money. Within three months of that it became entitled to exercise its power of sale, the mortgage money not having been paid. That is a right under section 103 of the Law of Property Act, 1925. That time having passed, the present originating summons was taken out on January 4, 1957, there being at that time no default in the payment of interest because the arrears had been paid up. There is no default at the present moment. But that has nothing to do with the matter.

The master at the hearing on February 22, 1957, held that the mortgagee was entitled to his order, but, nevertheless, deferred the effect of it for two months. Whether he had authority to go so far I have some doubt. Twenty-eight days is the ordinary time; but he made that order and the mortgagee does not greatly object. I propose to treat that order as having been made, but so far as delay in its execution is concerned, as being made with consent. I cannot, in my judgment, possibly upset the master's order. It is clear that the mortgagee is entitled to relief, and the court has no power to refuse it the relief for which it asks. There will be an order for possession within two months from February 22, 1957.

Order accordingly.

Solicitors: *Ronald Fletcher & Co.; Bell & Ackroyd.*

I. G. R. M.

In re GOUGH, DEC'D.
PHILLIPS *v.* SIMPSON AND OTHERS.

1957
Apr. 15, 17.

Vaisey J.

[1956 G. No. 1809.]

Trust and Trustee—Howe v. Lord Dartmouth, rule in—Long leaseholds—Whether rule applicable—Residuary bequest including long leasehold—Whether property held on trust for sale or settled land—Testator's intention—Settled Land Act, 1925 (15 & 16 Geo. 5, c. 18), s. 73 (1) (xi).

Settled Land—Investments authorized—Long leaseholds—Propriety—Settled Land Act, 1925, s. 73 (1) (xi).

A testator by his will dated May 8, 1934, provided: "the residue of my estate real and personal whatsoever and wheresoever situate I leave to my . . . wife in trust for life. On the demise of my wife I bequeath to . . . M. A. S. [his sister] or her issue the residue of my property real and personal, and after their demise to the St. Dunstan's Home for Blinded Soldiers."

The residuary estate included a long leasehold which at the time of the testator's death in 1935 still had more than 65 years to run. His wife and sister died in 1954 and 1953 respectively, and the persons entitled as issue of the sister included two infants. On a summons to determine whether the estate of the testator was held on trust for sale or under the Settled Land Act, 1925, the charity contended that the leasehold property should be sold under the rule in *Howe v. Lord Dartmouth* (1802) 7 Ves. 137:—

Held, (1) that on the true construction of his will the testator intended the beneficiaries to enjoy his estate in specie; and in so far as the rule in *Howe v. Lord Dartmouth* (supra) was based on intention, no such intention could be implied on the part of the testator.

(2) That on the authorities this property was settled land held under the Settled Land Act, 1925, and no trust for sale could be inferred.

(3) That the rule in *Howe v. Lord Dartmouth* (supra) no longer applied to long leaseholds since they were authorized investments under section 73 (1) (xi) of the Act.

Per curiam. It did not necessarily follow that the purchase of a long leasehold would be a proper investment in all cases of settlements.

ADJOURNED SUMMONS.

George Gough, a schoolmaster, by his will dated May 8, 1934, made certain specific gifts in favour of his sister Mary Ann Simpson and other persons, and then he gave to his wife, Eva Gough, "the residue of my estate real and personal whatsoever and wheresoever on trust for her lifetime." He appointed her sole executrix. The will then proceeded as follows:

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" I give to my dear wife, Eva Gough, absolutely my War Loan
" and any cash I possess, and the residue of my estate real and
" personal whatsoever and wheresoever situate I leave to my said
" wife in trust for life. On the demise of my wife I bequeath to
" the aforesaid Mary Ann Simpson or her issue the residue of
" my property real and personal, and after their demise to the
" St. Dunstan's Home for Blinded Soldiers. If necessary for
" my wife's comfort she is entitled to sell Brook College [Cottage]
" Llangennith and retain proceeds."

The testator died on August 27, 1935, and his widow, Eva Gough, proved his will on November 6, 1935. His estate included Brook Cottage, a freehold valued at £350, some small items of personalty of little value, and 51, Bernard Street, Swansea, Glamorgan, a property which was held under a lease for 99 years less one day from March 25, 1902, at a rental of £3 10s. per annum and was valued at £525. At the death of the testator these leasehold premises were therefore held on a term of which more than 65 years were then unexpired.

His sister, Mary Ann Simpson, died on May 1, 1953, leaving issue four persons only, who were all defendants to this summons; namely, a son, Alfred William Simpson, and three grandchildren, that is to say, an adult, Michael Simpson, and two infants. They were all born in the lifetime of the widow. It was agreed that the ultimate gift to the defendants St. Dunstan's would not take effect until the death of the last survivor of the four defendants.

The widow died on April 29, 1954, and the plaintiff, Charles Wilfrid Phillips, was her legal personal representative. Brook Cottage had been sold and the proceeds received by the widow as provided in the will, and the testator's estate now consisted of the leasehold property, 51, Bernard Street, and a small quantity of furniture.

After the testator's death St. Dunstan's agreed that the widow should continue to live at No. 51, Bernard Street, which she did; but they had now suggested that the property ought to be sold and the proceeds invested in authorized trust securities. On the other hand, the two adult defendants, who were presently interested in the income to the extent of a moiety, wished the property to be retained.

The plaintiff took out the present summons to have determined whether, in the events which had happened, the leasehold property known as 51, Bernard Street, aforesaid, which formed a part of the residuary estate of the testator, was now held (a) on

trust for sale, or (b) on trust to vest the same in the first and second defendants as the persons for the time being constituting the tenant for life thereof for the purposes of the Settled Land Act, 1925.

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D. H. Mervyn Davies for the plaintiff.

John Monckton for the first four defendants, issue of the testator's sister, Mary Ann Simpson. The rule in *Howe v. Lord Dartmouth*¹ does not apply to this property. On the true construction of this will this is settled land and no trust for sale can be inferred. The successive descriptions of property given by the testator—the material one of which refers to the residue “of my property”—taken together with the express authority to sell Brook Cottage show that the testator intended his beneficiaries to enjoy his estate in specie. In fact no authority to sell was required, because the tenant for life's power of sale cannot be fettered: section 106 of the Settled Land Act, 1925. When the testator referred to “my property” he was still thinking of the assets existing at his death; he does not himself distinguish between one part of his residue and another.

The rule in *Howe v. Lord Dartmouth*¹ no longer applies to leaseholds exceeding 60 years in length. By section 73 (1) (xi)² of the Settled Land Act, 1925, long leaseholds are an authorized investment; thus, if Brook Cottage had been sold, the capital moneys could have been immediately invested in a similar lease. The rule ascribes to the testator an intention that his property should be sold and converted; but in a trust for sale such an intention is no longer ascribed to a testator: see section 28 (2) of the Law of Property Act, 1925, although there is no reference to the rule in the section. By section 28 (1), also, long leaseholds are an authorized investment: see *In re Berton*³ and *In re Brooker*.⁴

E. I. Goulding for the fifth defendant, St. Dunstan's. It is begging the question to say that long leaseholds are authorized investments. Before 1926 the rule in *Howe v. Lord Dartmouth*⁵ would have operated on this house; that would have had a two-fold effect: (1) the property would have been sold and invested

¹ (1802) 7 Ves. 137.

² Settled Land Act, 1925, s. 73 (1): “Capital money arising under this Act . . . shall . . . be invested, or otherwise applied . . . in one . . . of the following modes (namely):—
“ . . . (xi) In purchase of land in fee

“ simple, or of leasehold land held for
“ sixty years or more unexpired at
“ the time of purchase . . . ”

³ [1939] Ch. 200; 55 T.L.R. 40;
[1938] 4 All E.R. 286.

⁴ [1926] W.N. 93.

⁵ 7 Ves. 137.

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in authorized investments, and (2) pending such sale and investment the tenant for life would have been limited to 4 per cent. interest. It would have been held before 1926 that this was a trust for sale which arose from the intention of the testator that the same thing as represented by his personalty should be enjoyed by different persons in succession. Nothing in the legislation of 1925 alters the intention of the testator. The law can, of course, alter the effect of an intention, but simply as a matter of interpretation the legislation cannot alter what the testator actually wanted. The same intention should still be attributed to the testator, and on the true construction of this will a trust for sale should be read into this will.

The general rule in *Howe v. Lord Dartmouth*⁵ is that where personal property of a wasting nature is bequeathed for successive interests, it should be sold and the proceeds converted into authorized investments.

[VAISEY J. What if it had been a lease for 999 years?]

The court never distinguishes between different kinds of leasehold. In *In re Wareham*⁶ the rule in *Howe v. Lord Dartmouth*⁷ was applied where a testator left leaseholds of varying terms, some being for quite short terms, and Farwell L.J. said that there was every probability of the tenant for life using them up in his lifetime. Similarly, on the facts of this case, if the rule is not applied, St. Dunstan's may get nothing if this lease is retained.

The reference to long leaseholds as being authorized investments under section 73 (1) (xi) of the Settled Land Act is to capital money arising under that Act; that is the class of money for which long leaseholds are authorized investments. This property does not become subject to the Settled Land Act, as it is land held on trust for sale, which is excluded from the operation of the Act: see section 1 (7) of the Settled Land Act, 1925.

Where, as here, an express trust for sale is written into the will, then by section 28 (1) of the Law of Property Act, 1925, there is an implied power to postpone the sale for an indefinite period: *In re Brooker*⁸ and *In re Berton*.⁹ It is accepted that this property should be treated on the same lines as *In re Berton*,⁹ that is, a trust for sale being written into the will with power to postpone the sale at the discretion of the trustees.

With regard to the argument that this is settled land, it cannot be said on any rule of construction that there is any indication

⁵ 7 Ves. 137.

⁶ [1912] 2 Ch. 312.

⁷ 7 Ves. 137.

⁸ [1926] W.N. 93.

⁹ [1939] Ch. 200.

in the will that these are gifts to be enjoyed in kind. There could hardly be a more typical case for the application of the rule in *Howe v. Lord Dartmouth*¹⁰; if the property is not sold, St. Dunstan's may never receive anything—which cannot be what the testator intended.

Monckton in reply. In *In re Trollope's Will Trusts*¹¹ *Tomlin J.*, who accepted the reasoning of *In re Brooker*,¹² held that *Howe v. Lord Dartmouth*¹³ no longer applied to long leaseholds during the period of postponement of the sale of leaseholds held on trust for sale. These cases are important as showing that the intention which might be imputed to a testator before 1926 might be varied by the legislation of 1925. It is another instance of Parliament giving a different meaning to the intention of the testator.

The rule in *Howe v. Lord Dartmouth*¹³ never applied to authorized investments, and where there was a power, as in *In re Nicholson*,¹⁴ to retain investments, those investments thereby became authorized investments and it did not matter that they were of a wasting nature; similarly as long leaseholds are now authorized investments under section 73 (1) (xi), it does not matter that they may be of a wasting nature. It appears to be on this ground that textbook writers take the view which supports this submission: see *Jarman on Wills*, 8th ed., vol. 2, p. 1225; *Theobald on Wills*, 11th ed., p. 456, and 6 *Conveyancer N.S.*, p. 155.

No one would mind the rule in *Howe v. Lord Dartmouth*¹⁵ being whittled away; it is submitted that that is the effect of the legislation of 1925. It should be borne in mind that the rule is an intention attributed to a testator who has given successive interests in property of a wasting nature in order to preserve the property for those interests, but that intention should not be attributed to this testator when precisely the same sort of property could be bought again under statutory powers; the court should hold that this being an authorized investment the rule in *Howe v. Lord Dartmouth*¹⁵ is now excluded.

Cur. adv. vult.

April 17. *VAISEY J.*, having stated the facts, continued: It is apprehended that the leasehold property was vested in the

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¹⁰ 7 Ves. 137.

¹¹ [1927] 1 Ch. 596.

¹² [1926] W.N. 93.

¹³ 7 Ves. 137.

¹⁴ [1909] 2 Ch. 111.

¹⁵ 7 Ves. 137.

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widow at the date of her death either (a) as a trustee for sale by virtue of a trust for sale to be implied in the testator's will, or (b) as a tenant for life for the purposes of the Settled Land Act, 1925. In either case the property is now vested in the plaintiff as the widow's executor. The plaintiff is the widow's brother and in fact had lived in the property with her since 1935.

The question now arises whether the property is for the purposes of the statute of 1925 settled land, or held on trust for sale. In the latter case it cannot be settled land: see Settled Land Act, 1925, ss. 1 (7) and 2.

First, on the construction of the will, I incline to the view that the testator intended the beneficiaries to enjoy his estate in specie, and that when he refers to "my property" he is thinking of his property as existing at the time of his death.

Secondly, I think that the rule in *Howe v. Lord Dartmouth*¹ can no longer apply to leaseholds held for a term exceeding 60 years, they being now authorized investments under section 73 (1) (xi) of the Settled Land Act, 1925, and incidentally also under section 28 (1) of the Law of Property Act, 1925, though this last mentioned section does not, in my judgment, apply.

Thirdly, in so far as the rule—that is, in *Howe v. Lord Dartmouth*¹—is based on an implied intention of the testator, I can find no foundation for such an intention.

But it by no means follows that the purchase of a long leasehold investment would be proper in all cases of settlements, or in this case at the present time; but this is not, in my view, relevant to the question which I have to decide, as the property was part of the testator's residuary estate at his death.

On the authorities, I think that this is settled land and that no trust for sale can in the circumstances be implied. See *In re Nicholson*,² *In re Berton*,³ and *In re Brooker*.⁴ See also Jarman on Wills, 8th ed., p. 1225, and Theobald on Wills, 11th ed., p. 456. I was also referred to *In re Wareham*,⁵ *In re Trollope's Will Trusts*,⁶ and *In re Jefferys*,⁷ which are not, in my view, in point.

I will declare that in the events which have happened the leasehold property, 51, Bernard Street, Swansea, in the County of Glamorgan, forming part of the residuary estate of the testator

¹ (1802) 7 Ves. 137.

² [1909] 2 Ch. 111.

³ [1939] Ch. 200; 55 T.L.R. 40;
[1938] 4 All E.R. 286.

⁴ [1926] W.N. 93.

⁵ [1912] 2 Ch. 312.

⁶ [1927] 1 Ch. 596.

⁷ [1939] Ch. 205; 55 T.L.R. 44;
[1938] 4 All E.R. 120.

George Gough is not subject to any trust for sale but is held by the plaintiff upon trust to vest the same in the defendants Alfred William Simpson and Michael Simpson as the persons for the time being constituting the tenant for life thereof for the purposes of the Settled Land Act, 1925.

Declaration accordingly.

Solicitors: *Chamberlain & Co. for Beor, Wilson & Lloyd, Swansea; David Morris & Co. for Cyril Goldstone & Co., Swansea; Ranger, Burton & Frost.*

I. G. R. M.

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March 19.

Revenue—Income tax—New source of income—"Source"—Deposit account at bank—Interest payable on sums deposited—Whether new contract between customer and bank arises every time a fresh sum deposited—"New source, or addition to source, of income"—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case III—Finance Act, 1951 (14 & 15 Geo. 6, c. 43), s. 21.
Banking—Deposit account—Contract—Whether new contract whenever money paid in.

Lord Goddard
C.J.,
Jenkins and
Sellers L.JJ.

The taxpayer had for several years before 1951 kept a deposit account with his bank. In the first quarter of 1951, down to March 16, 1951, the amount standing to his credit on such account was £20,496. On March 17, 1951, he paid a further sum of £2,000,000 by cheque into the account, and on March 30, 1951, he withdrew from the account £250,000. The arrangement as regards interest was that it was credited on half-yearly rest dates, June 20 and December 20 in each year, and it was calculated in the ordinary way on a day-to-day basis. The interest, when credited, became principal, and then, but not before, began itself to earn interest. It was not the practice to allow accruing interest to be withdrawn between the rest dates, but if an account was closed interest was calculated to the date of closure, credited as principal, and withdrawn. The rate of interest varied from time to time. Fourteen days' notice of withdrawals from the deposit account was required, and withdrawal without notice involved the customer in a loss of 14 days' interest.

On appeal from assessments to income tax under Schedule D made on the taxpayer for the years 1951-1952 and 1952-1953, the special commissioners held that he had not acquired a new source, or an addition to a source, of income when he made the deposit on March 17, 1951, and that neither section 21 of the Finance Act,

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1951, nor section 30 of the Finance Act, 1926, had any application to the income the subject of the appeal:—

Held, (1) that where such a deposit account was kept between a customer and a banker there was not a new contract every time money was paid in; but one continuing contract between them.

(2) That, however, since the contract itself yielded no income at all, the source of the income was the deposit of money upon the terms of the contract.

(3) That, accordingly, by the deposit of the £2,000,000 with the bank, and the payment of interest thereon, the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Schedule D and that such income was to be computed under the provisions of section 21 of the Finance Act, 1951.¹

Decision of Vaisey J. [1956] 1 W.L.R. 1105; [1956] 3 All E.R. 52 affirmed.

¹ Finance Act, 1951, s. 21:
“(1) If at any time any person acquires—(a) a new source of any profits or income in respect of which he is chargeable either under Rule 1 of the Rules applicable to Case III of Schedule D or under Case IV of Schedule D or under Case V of Schedule D; or (b) an addition to any source of any such profits or income, then, for the year of assessment in which income first arises from the source or addition and the two following years of assessment—(i) income tax in respect of the profits or income from the source or addition shall be computed separately; and (ii) in the case of profits or income chargeable under Rule 1 of the Rules applicable to Case III, the provisions of paragraph (1) of Rule 2 of those Rules shall apply, and, in the case of profits or income chargeable under Case IV or Case V, the provisions of proviso (b) of subsection (1) of section twenty-nine of the Finance Act, 1926, shall apply.

“(2) Subsection (1) of this section shall have effect in lieu of paragraph (ii) of the proviso to section thirty of the Finance Act, 1926, and the references to that paragraph contained in paragraph (iv) of that proviso shall be construed as references to the said subsection (1).

“(3) The preceding provisions of this section shall apply in relation to sources or additions to sources

“acquired on or after the sixth day of April, nineteen hundred and fifty-one and to sources or additions to sources acquired before that date where the income or profits first arose therefrom on or after that date, but shall not apply in any other case. . . .

“(5) In this section, references to profits or income chargeable under Rule 1 of the Rules applicable to Case III of Schedule D shall be construed as including references to profits or income chargeable under that Case as if they were mentioned in the said Rule 1”

Income Tax Act, 1918, Sch. D:
“Rules applicable to Case III.
“1. The tax shall extend to—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereof, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods; . . .

“2. [New rule substituted by s. 17 of the Finance Act, 1922.]—(1) The tax shall, subject as hereinafter provided, be computed—(a) as respects the year of assessment in which the profits or income first

APPEAL from Vaisey J.²

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This was an appeal by the taxpayer, John Young Sangster, from the decision of Vaisey J., who reversed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, who had substantially reduced assessments made upon the taxpayer to income tax Schedule D for the years 1951-1952, 1952-1953, in respect of interest on a deposit account which he kept with the Colmore Row, Birmingham, branch of Barclays Bank.

The case stated by the Commissioners for the Special Purposes of the Income Tax Acts, so far as relevant, provided:

1. At a meeting of the commissioners held on January 28, 1955, John Young Sangster (hereinafter called "the taxpayer") appealed against assessments made upon him to income tax, Schedule D, for the years and in the amounts following:—1951-1952: £7,037; 1952-1953: £29,371.

2. The main ingredient in the amount assessed for each year was interest upon the taxpayer's deposit account with the Colmore Row, Birmingham, branch of Barclays Bank, and the question for determination by the commissioners was the correct method of computing the income tax in respect of such interest.

3. (1) The assessment for 1952-1953 was made under the provisions of the Income Tax Act, 1952. The assessment for 1951-1952 was made under the provisions of the Income Tax Acts in force prior to the coming into operation of the Income Tax Act, 1952. The appeal was argued before the commissioners by reference to the latter provisions (i.e., the earlier enactments), it being common ground between the parties that there was no material difference between such provisions and those contained

"arise, on the full amount of the
 "profits or income arising within that
 "year; and (b) as respects subse-
 "quent years of assessment, on the
 "full amount of the profits or income
 "arising within the year preceding
 "the year of assessment: Provided
 "that—(i) where the profits or income
 "first arose on some day in the year
 "preceding the year of assessment
 "other than the sixth day of April,
 "the computation shall be made on
 "the profits or income of the year
 "of assessment; and (ii) where the
 "profits or income first arose on the
 "sixth day of April in the year pre-
 "ceding the year of assessment, or
 "on some day in the year next before

"the year preceding the year of
 "assessment other than the sixth
 "day of April, the person charged
 "shall be entitled, on giving notice
 "in writing to the surveyor of taxes
 "at any time within twelve months
 "after the end of the year of assess-
 "ment, to be charged on the amount
 "of the profits or income of that
 "year, and if the tax charged has
 "been paid, any amount overpaid
 "shall be repaid.

"(2) Tax shall be paid on the
 "actual amount computed as afore-
 "said without any deduction."

² [1956] 1 W.L.R. 1105; [1956]
 3 All E.R. 52.

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in the Income Tax Act, 1952. In stating this case the commissioners followed the same course and made references to the earlier enactments as if they applied to the 1952-1953 assessment in the same manner as they applied to the 1951-1952 assessment.

(2) The assessments under appeal were made upon the basis that the income in question had to be computed in accordance with the Finance Act, 1951, s. 21, which deals with cases where a person acquires a new source or an addition to any source of income chargeable under Case III of Schedule D. The provisions apply in relation to new sources or additions to sources of income acquired before April 6, 1951, only where income first arose therefrom on or after that date.

(3) Cases where a person has acquired a new source or an addition to any source of such income and income first arose therefrom before that date are governed by the Finance Act, 1926, s. 30.

(4) If the matter were governed by the Finance Act, 1951, s. 21, then subparagraph (a) of and the proviso to paragraph 2 (1) of the Rules applicable to Case III of Schedule D to the Income Tax Act, 1918, would apply to interest upon the deposit of £2,000,000 made on March 17, 1951 (as set out in paragraph 4 hereof), in relation to the years of assessment 1951-1952, 1952-1953 and 1953-1954.

(5) If the matter were governed by the Finance Act, 1926, s. 30, then subparagraph (a) of and the proviso to the said paragraph 2 (1) would apply to the said interest in relation to the years of assessment 1950-1951, 1951-1952 and 1952-1953.

(6) If the matter were not within either of the said sections of the Finance Acts, 1951 or 1926, then subparagraph (b) of the said paragraph 2 (1) would apply in relation to all material years of assessment.

4. . . . The taxpayer had the deposit account for many years prior to 1951, and in the early part of 1951 it stood at £20,496. On March 17, 1951, he paid in £2,000,000. On March 30, 1951, he withdrew £250,000. Interest on the account was credited on June 20 and December 20 in each year.

5. The commissioners found the following facts:—

No special agreement was concluded between the taxpayer and the bank.

Interest on deposit accounts was calculated on the principal on a day-to-day basis and was credited on half-yearly rest dates, June 20 and December 20 in each year. When it was so credited, the interest became principal and then (and not

before) began itself to earn interest. It was not the practice to allow accruing interest to be withdrawn between the half-yearly rest dates, save that if an account was closed at any time interest was calculated up to the date of closure, credited and withdrawn as principal. The rate of interest varied from time to time.

In 1951 the bank required 14 days' notice of withdrawals from deposit account; a depositor who wished to make a withdrawal without this notice could do so, but would lose 14 days' interest on the sum withdrawn. The taxpayer withdrew £250,000 on March 30, 1951, without giving the 14 days' notice, and 14 days' interest on this sum was deducted in calculating the interest credited on the following June 20.

The sum of £2,215 3s. 1d. was credited for interest on June 20, 1951. . . .

6. It was contended on behalf of the taxpayer:—

(1) That when the taxpayer paid in £2,000,000 to the credit of his deposit account on March 17, 1951, he did not acquire a new source, or an addition to a source, of income within section 21 of the Finance Act, 1951, or section 30 of the Finance Act, 1926.

(2) That income tax upon the interest on the taxpayer's deposit account should be computed for 1951–1952 and 1952–1953 on the preceding year basis in accordance with paragraph 2 (1) (b) of the Rules applicable to Case III of Schedule D to the Income Tax Act, 1918.

(3) Alternatively, that if the taxpayer did acquire a new source, or an addition to a source, of income when he paid in the said sum of £2,000,000, income first arose therefrom prior to April 6, 1951; that section 21 of the Finance Act, 1951, was accordingly not applicable to such income, and that income tax for the years to which the appeal related should be computed in accordance with section 30 of the Finance Act, 1926.

7. It was contended on behalf of the Crown:—

(1) That the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Schedule D on March 17, 1951.

(2) That income first arose therefrom after April 6, 1951; that is to say, on June 20, 1951, when the interest was placed at the credit and disposal of the taxpayer.

(3) That income tax for the years to which the appeal related was properly computed by reference to the provisions of section 21 of the Finance Act, 1951.

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The commissioners were referred, inter alia, to the following authorities: *Cull v. Cowcher*³; *Simpson v. Executors of Bonner Maurice*⁴; *St. Lucia Usines and Estates Co. v. St. Lucia (Colonial Treasurer)*⁵; *Dewar v. Commissioners of Inland Revenue*⁶; Apportionment Act, 1870.

The commissioners gave their decision as follows: "We held that the source, and the only source, of the income in question was the contractual relationship between [the taxpayer] and the bank which came into being when [the taxpayer] first opened his deposit account; in our opinion the authorities to which our attention was drawn, and in particular the decision of Finlay J. in *Cull v. Cowcher*⁷ (which had been relied on by both parties to the appeal), pointed to that conclusion.

"We held that [the taxpayer] did not acquire a new source of income when he made the deposit on March 17, 1951, and that neither section 21 of the Finance Act, 1951, nor section 30 of the Finance Act, 1926, had any application to the income which was the subject of the appeal. It was accordingly not necessary for us to make any decision upon [the taxpayer's] alternative contention, but we indicated the opinion we had formed that if a new source, or an addition to a source, of income was acquired on March 17, 1951, income first arose therefrom on June 20, 1951.

"On April 26, 1955, we determined the appeal by adjusting the assessments to the following figures, which had been agreed between the parties to be correct upon the basis of our decision in principle: the 1951-1952 assessment we reduced to £53; the 1952-1953 assessment we reduced to £7,032."

The inspector of taxes appealed to the court. On July 3, 1956, the appeal was allowed by Vaisey J., who held that the source or origin of the interest on the £2,000,000 was the deposit of the money coupled with the contract between the taxpayer and the bank; that it was not to be found in an existing contract but that a new contractual relationship resulted from and was brought into existence by the tender of that sum by the taxpayer and its acceptance by the bank on the date in question; that, accordingly, the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Schedule D on March 17, 1951; that income first arose therefrom after April 6, 1951,

³ (1934) 18 T.C. 449.⁶ [1935] 2 K.B. 351; 19 T.C. 561;⁴ (1929) 14 T.C. 580; 45 T.L.R.

51 T.L.R. 536.

581.

⁷ 18 T.C. 449.⁵ [1924] A.C. 508.

namely, on June 20, 1951, when the income was placed to the credit of and at the disposal of the taxpayer; and that income for the years to which the appeal related was properly computed by reference to section 21 of the Finance Act, 1951.

The taxpayer appealed.

F. Heyworth Talbot Q.C. and *G. A. Grove* for the taxpayer. The question is whether in respect of the assessments for income tax under Schedule D for the years 1951-1952 and 1952-1953 the taxpayer is assessable on the income of the previous year basis or on the actual income of the year basis. The answer to that question involves the crucial issue whether or not the taxpayer when he paid the sum of £2,000,000 into his deposit account thereby acquired a new source, or an addition to a source, of income chargeable under Case III of Schedule D. The source of the income is the contractual right of the depositor to be paid interest. When a customer opens a deposit account a contract is made with the bank under which, so long as the account continues in existence, interest will be paid on whatever balance there is to the credit of that account. In other words, there is one contract which continues to run throughout the existence of the deposit account.

Contrary to the contention of the Crown, a new contract is not entered into on every occasion on which the depositor pays a sum into that account. It is conceded that if the lodgment of the sum in question did constitute a new source, or an addition to a source, then the income therefrom first arose after April 5, 1951, and that for tax purposes it is to be computed in accordance with the provisions of section 21 of the Finance Act, 1951.

The relationship between banker and customer is that of debtor and creditor: *per* *Atkin L.J.* in *Joachimson v. Swiss Bank Corporation*.⁸ That case concerned a current account, but the only differences between a current and a deposit account are (a) that a person who opens a deposit account has no right to draw cheques on the account but he may withdraw moneys from it after giving the requisite notice, and (b) that the banker agrees to pay interest at the current rate for deposit accounts. The interest arises from the operation of the contract on the subject-matter of the contract. The source of the income is the contractual right to be paid interest.

Accordingly, on the deposit of the sum in question, the taxpayer did not acquire a new source or an addition to a source of

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⁸ [1921] 3 K.B. 110, 126; 37 T.L.R. 534.

C. A. income. [Reference was also made to section 30 of the Finance Act, 1926, section 43 (1) of the Finance Act, 1927, and *Cull v. Cowcher*.⁹]

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Grove following. If the Crown be right in their contention, it would mean that not only would the taxpayer have to make a return dealing with comparatively trivial amounts, but each deposit would have to be segregated for three years and the interest on it would have to be dealt with as income from a new and separate source. That would cause very great practical difficulties.

Roy Borneman Q.C. and *Sir Reginald Hills* for the Crown. There is a new contract every time a sum is accepted on deposit. Even if it be held that there is a single continuing contract throughout the existence of a deposit account, that of itself produces no income. It is the operation of that contract on the particular sums of money deposited that produces the income, where there is a contractual right to receive interest, and accordingly new deposits of money in a deposit account are new sources or additions to sources of income within Case III of Schedule D.

Heyworth Talbot Q.C. replied.

LORD GODDARD C.J. This is an appeal from a judgment of *Vaisey J.*, who reversed the decision of the special commissioners, who adjusted certain assessments for the years 1951-1952 and 1952-1953 made upon Sangster in respect of certain interest which he received on a deposit account which he kept at Barclays Bank.

Sangster, who evidently had the handling of very large sums of money, had kept a deposit account at Barclays Bank for some years, and there was no special arrangement at the time when he opened his deposit account entered into between him and the banker. The commissioners have found, therefore, that the contract between them was the ordinary contract common between English bankers and their customers in respect of deposit accounts. They have set their reasons out in the case, and they find that "Interest on deposit accounts was calculated "on the principal on a day-to-day basis and was credited on "half-yearly rest dates, June 20 and December 20 in each year. "When it was so credited, the interest became principal and then "(and not before) began itself to earn interest. It was not the "practice to allow accruing interest to be withdrawn between "the half-yearly rest dates, save that if an account was closed "at any time, interest was calculated up to the date of closure,

⁹ 18 T.C. 449, 454.

“credited and withdrawn as principal. The rate of interest
“allowed varied from time to time.”

It happened that in 1951 a very large sum of money amounting to £2,000,000 was paid into the deposit account, which even then had a substantial sum of money in it, and it is in respect of interest earned by this very largely increased amount of money paid in that this appeal arises.

The point which the court has to decide is one which is exceedingly simple in statement. It is, what was the source of the income? The special commissioners held that the contract was the source of the income. Vaisey J. took a different view, and I think held that the source of income was the deposit of the money coupled with the contract. I say at once that I cannot agree that where a deposit account is kept between a customer and a banker there is a new contract every time money is paid in; I think that it is one continuing contract, but the contract itself yields no income at all. The deposit of money would yield no income at all unless there was an agreement, express or implied, to pay income. The source of the income seems to me to be the deposit of money upon certain terms. Unless the money has been deposited there will be no income; that is to say, there can be no income because there would be nothing which would produce interest. Just as if there were only a contract to pay interest on money no interest would be payable until money was deposited, so it follows that if there were a deposit of money without an agreement to pay interest there would be no interest arising from it. There is no difference between a deposit account and a current account so far as the relationship of banker and customer is concerned. The relationship is perfectly clear. The leading case, of course, is *Foley v. Hill*,¹ mentioned in Atkin L.J.'s judgment in *Joachimson v. Swiss Bank Corporation*.² It is that of debtor and creditor; the banker borrows the money from the customer under terms to repay it. As a general rule he does not pay interest on a current account, although bankers do at times agree to allow interest on a current account if a certain credit balance is maintained. We need not consider current accounts in this case at all. We are only concerned with deposit accounts under which money is paid in at 14 days' notice; that is to say, that the customer cannot withdraw the money without giving 14 days' notice, though he may be allowed to do so if he gives up interest. Interest at the current rate is allowed by

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¹ (1848) 2 H.L.C. 28.

² [1921] 3 K.B. 110; 37 T.L.R. 534.

C. A. the banker, and the current rate generally is regulated by the
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Sangster had been assessed under Case III of Schedule D in respect of this interest which he had been receiving, and I think that it is necessary in considering this matter to refer to section 21 of the Finance Act, 1951. [His Lordship read part of subsection (1) and continued:] It was argued in the present case that the source of income was the contract. I cannot agree with that. I think that the source of income here was the deposit of money upon the terms of the contract. In my opinion, if an addition is made to the amount which is deposited, the words of section 21 are quite wide enough to catch it. I quite agree that certain difficulties might be imposed on the Inland Revenue if they were to pursue every deposit account and find whether or not there had been an addition to the account during the course of the year. That is a matter for the inspector of taxes or those responsible for the assessment to decide as to how they will deal with those matters. I do not suppose that in every case it would be worth the trouble that would be caused to the taxing authorities if they were to inquire into every deposit account and find if the interest had been increased, unless it had been increased by a large amount.

Here, of course, the increase of £2,000,000 is very great. In my judgment there is no question but that there has been a source of income or at any rate there has been an addition to a source of income in the deposit of this money and payment of interest on it.

For these reasons, which are not quite the same as those given by Vaisey J., I think that the appeal should be dismissed.

JENKINS L.J. I agree, and I cannot usefully add anything.

SELLERS L.J. I also agree.

Appeal dismissed.

*Leave to appeal to the House of Lords
refused.*

J. A. G.

Solicitors: *Hale, Ringrose & Morrow for Glaisyer, Porter & Mason, Birmingham; Solicitor of Inland Revenue.*

In re HODGE'S POLICY.HODGE *v.* INLAND REVENUE COMMISSIONERS.1957
Mar. 13, 14.Harman J.

[1956 H. No. 408.]

Revenue—Estate duty—Property chargeable—Property deemed to pass—Insurance policy—“Wholly kept up . . . for the benefit of a donee . . .”—“Kept up”—All premiums paid 36 years before death of assured—Policy partly mortgaged to insurance company—Whether duty payable on whole of policy moneys—Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2)—Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).

On November 14, 1912, the plaintiff's father effected a policy of assurance on his own life in the sum of £10,000. On September 12, 1913, the assured executed a voluntary settlement assigning the policy to trustees in favour of the plaintiff. The premiums on the policy were duly paid by the assured in 1913, 1914, 1915 and 1916, when the policy became fully paid up. In 1935 the policy was mortgaged by the plaintiff to the insurance company with whom it was effected to secure a loan of £1,000, with the promise to lend a further £4,000 on demand. On the death of the assured in 1950 the amount outstanding on the mortgage was some £5,000; the gross amount payable under the policy was £16,675. The Crown claimed duty on the whole of the policy moneys as being “money received under a policy of assurance . . . wholly kept up by [the “assured] for the benefit of a donee . . .” within the meaning of section 11 (1) of the Customs and Inland Revenue Act, 1889, and, accordingly, property deemed to pass on the death under section 2 (1) (c) of the Finance Act, 1894:—

Held, (1) that the policy was “wholly kept up” within the meaning of section 11 (1) of the Act of 1889, notwithstanding that the premiums had all been paid 36 years before the death of the assured, and the Crown's claim to estate duty succeeded.

Lord Advocate v. Inzievar Estates [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424 and *In re Oakes' Settlement* [1951] Ch. 156; 66 T.L.R. (Pt. 2) 831; [1950] 2 All E.R. 851 applied.

Barclays Bank Ltd. v. Attorney-General [1944] A.C. 372; 60 T.L.R. 531; [1944] 2 All E.R. 208 considered.

(2) That the duty was exigible on the whole of the policy moneys without any deduction for the amount of the mortgage due to the insurance company, since it made no difference that the mortgage money was due to the insurance company rather than to some third party as mortgagee.

ADJOURNED SUMMONS.

Rowland Frederic William Hodge (later Sir Rowland Hodge) took out a policy on his own life on November 14, 1912, with the Royal Insurance Co. in a sum of £10,000 with profits.

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The first premium, £1,475, was duly paid by Sir Rowland on the signing of the policy. The subsequent premiums were to be paid annually on September 14 over the next four years, namely, 1913, 1914, 1915 and 1916. These were paid by the assured and the policy became a fully paid policy in 1916. By an instrument dated September 12, 1913, the assured assigned the policy to trustees on a voluntary settlement in favour of his son, the plaintiff in these proceedings, Sir John Hodge. Under that settlement the trustees were to get in the policy moneys on the death of the assured, and to hold them or investments representing the same in trust for the plaintiff on his attaining 25 years absolutely. The settlement contained a power to advance to the plaintiff while he was under 25 up to one moiety of the insurance moneys.

The plaintiff became absolutely entitled to the policy and the moneys secured by it on May 1, 1938, when he attained the age of 25 years. Before that event, by an agreement made between himself, his father, the trustees and the insurance company, on April 17, 1935, he agreed to assign the policy by way of mortgage to the company for a consideration of £1,000 then lent, and a promise to lend a further £4,000 thereafter on demand. For that consideration the policy was deposited with the insurance company as security with the consent of Sir Rowland, who was then still interested in the policy moneys under a resulting trust in case his son should not attain 25.

The mortgage was duly increased to its maximum of £5,000 and was outstanding at the death of the assured on September 21, 1950. The gross amount then payable by the insurance company on the policy was £16,675. The mortgage with interest amounted to £5,431, the net amount receivable by the plaintiff therefore was £11,244.

The Revenue claimed from the trustees of the settlement payment of estate duty upon the death of the assured on the amount payable on his death under the policy under section 2 (1) (c) of the Finance Act, 1894, enacted by reference to section 11 (1) of the Customs and Inland Revenue Act, 1889.

The present summons was taken out by the plaintiff under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, although no demand had been made on him for payment of the estate duty, because he was a person who had reasonable grounds for apprehending that a demand might be made against him in respect of death duties on moneys paid under the policy.

The questions on the summons were: (1) Whether estate duty became payable on the death of Sir Rowland Frederic William Hodge on (a) the whole of the "money received "under" the said policy of assurance, and (b) if not so payable on the whole of the "money" so "received," whether estate duty became payable on any share or part thereof and if so what share or part (Customs and Inland Revenue Act, 1889, section 11 (1) and Finance Act, 1894, section 2 (1) c)).¹ (2) Whether the "money received" under the policy of assurance and chargeable with estate duty should be: (a) the whole of the said policy moneys, or (b) such policy moneys after allowing for any sum or sums paid prior to the death of the assured by the assurance company to the plaintiff and which (in the events which had happened) were not paid to, or "received" by, the plaintiff under the said policy.

Jackson Wolfe and *M. T. Swift* for the plaintiff. Section 11 (1) of the Customs and Inland Revenue Act, 1889, which was incorporated into the Finance Act, 1894, by section 2 (1) (c) thereof, was an amendment of section 38 of the Customs and Inland Revenue Act, 1881, and therefore should be construed with reference only to the objects of section 38 (1), being an "interest" which arises on an assured's death, or when annual sums for premiums ceased on that event. The subsection relates to a case where a policy "is" kept up, and not to one in which it "has been" kept up. Taxing statutes are directed to the facts existing at the date of their levy; at that date any premiums payable had been paid many years before. Policies existing in 1889 consisted almost solely of those with premiums continuing during the life insured: see Board of Trade returns and Hansard in 1889.

The Finance Act, 1894, did not purport to apply to property

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¹ Finance Act, 1894, s. 2: "(1) "Property passing on the death of the "deceased shall be deemed to include "the property following, that is to "say:—... (c) Property which would "be required on the death of the "deceased to be included in an "account under section 38 of the Customs and Inland Revenue Act, 1881, "as amended by section 11 of the "Customs and Inland Revenue Act, "1889 . . ."

Customs and Inland Revenue Act, 1889, s. 11 (1): "Section 38 (2) of

"the Customs and Inland Revenue "Act, 1881, is hereby amended, as "follows:—... The charge under the "said section shall extend to money "received under a policy of assurance "effected by any person dying on or "after June 1, 1889, on his life, "where the policy is wholly kept up "by him for the benefit of a donee, "whether nominee or assignee, or a "part of such money in proportion to "the premiums paid by him, where "the policy is partially kept up by "him for such benefit."

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in actual absolute ownership in possession. It contains no provision exempting such a policy if sold. The exempting sections in that Act, namely, sections 3 and 21 (3), do not apply to fully paid up policies if sold, even before 1894; presumably they would have applied if the Act taxed such policies. The policy was in the absolute ownership of the plaintiff for over 12 years. Any estate duty claimed thereon would, if the policy had been liable, have been defeated not by a sale thereof at any time, but only by its surrender even on the day before the death of the assured, an absurd result if the policy had been liable. Section 11 (1) refers to "kept up" and "keeping up"; such expressions are applicable only where there is a continuity of premiums payable, and not to only three or four after the "donee" was first named, as in this case. [Reference was made to *D'Avigdor-Goldsmid v. Inland Revenue Commissioners*²; *Barclays Bank Ltd. v. Attorney-General*³; *Lord Advocate v. Fleming*⁴; *Lord Advocate v. Inzievar Estates*,⁵ and *In re Oakes' Settlement*.⁶]

The plaintiff's case rests on this: where one gets a policy fully paid up in 1916, and a person had been contingently entitled to it since 1913 and absolutely entitled to it since 1938, that is not within the purview of the Act. One does not keep up a policy which does not require keeping up.

As regards the charge or mortgage on the policy: (a) the only "moneys received" by the donee from the company were the net moneys and not the gross. The insurance company was also the owner of the mortgage or charge. (b) The mortgage or charge existed in possession both before and after the assured's death and was therefore deductible: *Cowley v. Inland Revenue Commissioners*.⁷ (c) The Finance Act, 1894, contains no direct provision for such a deduction, section 7 (1) of the Act being limited to the assured's own estate, presumably only on the basis that such a deduction would be applicable in any event if the policy had been liable. (d) The "substance" of the transaction has alone to be considered: *Attorney-General v. Montagu*.⁸ This is shown by later Acts; for example, by section 33 (2) (b) (ii) of the Finance Act, 1954, such a deduction was impliedly given by existing legislation.

Geoffrey Cross Q.C. and E. Blanshard Stamp for the Crown.

² [1953] A.C. 347; [1953] 1 All E.R. 403.

³ [1944] A.C. 372; 60 T.L.R. 531; [1944] 2 All E.R. 208.

⁴ [1897] A.C. 145; 13 T.L.R. 216.

⁵ [1938] A.C. 402; 54 T.L.R. 692; [1938] 2 All E.R. 424.

⁶ [1951] Ch. 156; 66 T.L.R. (Pt. 2) 831; [1950] 2 All E.R. 851.

⁷ [1899] A.C. 198; 15 T.L.R. 270.

⁸ [1904] A.C. 316; 20 T.L.R. 523.

The argument that it cannot be said that a policy is "kept up" within the meaning of section 11 (1) unless the premiums are kept up until the death of the assured does not apply to policies for a limited period. On the facts of *In re Oakes' Settlement*⁹ this point plainly arose. The policies there were for 25 years, and it was held that lump sum payments which converted the policies into fully paid up policies some 29 years before the death were prepayment of premiums and that the policies had been "kept up," although no premiums had been paid for so many years. The present case is covered by *In re Oakes' Settlement*.⁹ The decision of the House of Lords in *Lord Advocate v. Inzievar Estates*¹⁰ shows that on a fair reading of section 11 (1) "kept up" is equivalent to "has been kept up." Unless the section be read in that way, there could never be a position where a policy is partly kept up. The fact that the donor has not paid the premiums down till his death does not therefore mean that the policy was not kept up by him. The argument may seem strange here because the premiums ceased so long ago, but if the donor had continued the payment of premiums till just before his death, the policy would have been kept up, and it cannot be a matter of degree whether a policy is kept up.

The mortgage was simply a borrowing by the son, who made himself strictly liable for the money, and it would not be right to treat it as an exercise of the power of advancement.

[HARMAN J. As I understand the argument for the plaintiff, the mortgage money remained in the coffers of the insurance company and did not pass.]

That does not matter, because it is a deeming section, and the money actually received by the plaintiff should be treated as the receipt of the whole of the policy money. The question should not be treated as if there would be any difference if the mortgage had been to someone other than the insurance company.

[HARMAN J. Suppose it had been an exercise of the power of advancement?]

That would have been a partial surrender and in that case a claim might not have been made on the whole. This was simply a loan to the plaintiff on which he paid interest; he could have paid it off at any time had he wished. It is wrong to draw any distinction between a mortgage to a third party and a mortgage to the insurance company which issued the policy. Payment of the balance of the policy money by the insurance company operates as a discharge by the plaintiff of the whole amount, just

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⁹ [1951] Ch. 156.¹⁰ [1938] A.C. 402.

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as where payment was to a third party mortgagee, who deducted his debt and paid the balance to the mortgagor, that would be a discharge by the mortgagor of the whole of the policy money.

HARMAN J., having stated the facts, continued: The claim of the Crown is for duty upon the gross sum received or receivable in respect of the policy on the death of the assured, and is based entirely on section 2 (1) (c) of the Finance Act, 1894. That is legislation by reference and causes to be included in property deemed to pass on the death of the deceased, property which would be required to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889. The Act of 1881 was the begetter of the account duty; the probate duty existed before that, but the Act also dealt to some extent with probate duty. Probate duty was paid on probates and inventories on the Inland Revenue affidavit of personal property of which a man died possessed and which passed to his executors as such. But the account duty was intended to embrace other kinds of personal property; (a) under a *donatio mortis causa*, (b) included in a joint tenancy, and (c) certain property under a voluntary settlement. The Act of 1889 mentioned these categories of property and added a new one in these words: "money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee." This undoubtedly is money received under a policy of assurance. The policy was certainly effected by a person dying after June 1, 1889, namely, the assured himself. It was equally certainly on his life. The controversial words are "where the policy is wholly kept up by him for the benefit of a donee." There is no doubt that here the plaintiff is a donee. There is no doubt that nobody paid any premium on this policy except the assured himself. But equally there is no doubt that no premium has been paid or payable since the year 1916. It comes as a shock that a policy which has been fully paid for nearly 40 years and has therefore not needed any keeping up during the whole of that time, and in respect of which there has been nothing to do but wait for the death of the assured, should now attract duty, although no beneficial interest in it passes from anybody to anybody else on the death. It has belonged absolutely to the plaintiff since 1938, 12 years before his father died: it is a striking thing that duty should be exigible in such circumstances. On

the other hand, there seems to be no doubt that if this had been what is called an ordinary whole life policy and the premiums had been payable periodically at dates continuing up to the death of the assured, the last paragraph of section 11 (1) in the Act of 1889 added by the Act of 1894 must have caught it.

It is said, however, that the section does not apply in this case, because at the relevant date, namely, the date when the policy was payable, it was not wholly or indeed at all kept up by the donor. The Crown nevertheless argued that these words must be read "has been wholly kept up," and that all that is required is to see who after the date of the gift has kept up the policy. The answer, of course, is the donor. Nobody else kept the policy up after the date of the settlement constituting the gift. It was argued that it cannot depend on whether premiums were paid over a long period of time or a short period of time; what has to be considered is who kept the policy up. The retort was that a taxing Act should not be extended in favour of the Crown and that one must only look at the language it contains. Mr. Wolfe argued that "is kept up" meant what it said, and it could not be postulated of this policy just before the death of the assured that it was the deceased who kept it up, because he had not done that for nearly 40 years. I cannot think that the result can depend on the way in which the premiums were paid, whether in large sums for a small number of years or small sums for a large number of years. There is indeed an observation of Lord Wright in a case analogous to this, *Barclays Bank Ltd. v. Attorney-General*,¹ in which he said: "I think that 'keeping up' a policy according to the ordinary use of language connotes payment of the premiums, which is the normal method of keeping up a policy. This generally involves periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not, apparently, contemplate this contingency. . . ." That is a view (obiter, I think) that a single premium policy would not be caught by the Act because it is never "kept up" at all. It follows that if there are periodical payments by the donor, whether two, three or 25, the policy can be said to be kept up by the donor from the tax point of view.

Consequently, though the language is awkward, I feel that I must come to the conclusion that this policy comes within the section. I am reinforced to some extent in that view by the

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¹ [1944] A.C. 372, 379; 60 T.L.R. 531; [1944] 2 All E.R. 208.

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latter part of the subsection, which reads in these terms: "or "a part of such money in proportion to the premiums paid by "him, where the policy is partially kept up by him." There have been cases on that passage and it has been decided that where after the date of a gift the donor pays some premiums and thereafter the donee pays the rest that is a policy which comes within the section "to a proportionate part of its value," and the House of Lords, though they did not, I think, specifically deal with this question, must have held in *Lord Advocate v. Inzievar Estates*² that the policy may be partially kept up by the settlor or donor even though he does not pay premiums or parts of premiums up to the last date, but pays some of the earlier ones. It seems to follow in the view of the House of Lords, that as one may partially keep up the policy by paying some of the premiums although one stops long before the death, so also a policy might be wholly kept up by the payment of all the premiums although they stop long before the death. This is in accord with what I understand to be the effect of the decision of Romer J. in *In re Oakes' Settlement*.³ That case is not very clearly reported and I am not convinced that the point was there really in the judge's mind, though I find in the headnote these words: "it was not necessary in order to keep "a policy alive that the periodic payment of the premiums "should be continued until the policy matured." Whether the case is exactly in point I do not know; the chief argument depended on this, that the donor had commuted future premiums by a lump sum, and it was then suggested that such a payment was not the keeping up of a policy, and therefore the section did not apply. The judge rejected that, and it seems to be his view that had there been no commutation of that sort the policy would have been kept up by the donor though the premiums would have ceased some time before his death. Whether that was in the judge's mind or not I remain uncertain. As I say, however, that case encourages me to think that my view is the correct one. Consequently I hold upon the first question that the section does apply.

The second question is this. As I have said, money was borrowed by the plaintiff on the security of this policy and that money remained due when his father died. The lenders were the insurance company themselves, and consequently they will not pay over to the trustees or to the plaintiff the gross amount of

² [1938] A.C. 402; 54 T.L.R. 692;
[1938] 2 All E.R. 424.

³ [1951] Ch. 156; 66 T.L.R.
(Pt. 2) 831; [1950] 2 All E.R. 851.

the policy money, but will deduct the amount of their mortgage debt and hand him the balance. Mr. Wolfe contended, therefore, that he ought only to pay on the balance because the section says that the charge shall extend to money "received" under a policy of assurance; in other words, not money receivable, but the actual amount that comes in to the trustees of the settlement or the sole beneficiary, the plaintiff.

If the transaction of loan had been, as it might have been, effected by way of a mortgage of the policy to a third party I do not think that this argument would have been tenable. The third party as mortgagee would have given a receipt for the whole of the policy moneys, would have deducted his mortgage debt, and accounted for the balance to the plaintiff, who when he had got that balance would be relieved of the mortgage debt and would have to give a good quittance to the insurance company for the whole sum. Indeed, the mortgagee would have given a receipt for the whole policy moneys and would do it, I think, as agent for the mortgagor, and therefore the plaintiff would have received in fact the gross amount of the policy money in that way. I do not think it can make any difference that the mortgagee is in fact the same person as the insurance company. The insurance company, although it cannot give itself a good receipt, can, as agent for the mortgagor deduct its debt and get a good receipt from the plaintiff by paying him only the balance. It seems to me, therefore, that the money received by the plaintiff is the whole money payable under the policy by the insurance company, notwithstanding the fact that it has been depleted by this mortgage transaction.

I ought perhaps to add that there was a power to advance this plaintiff when he was under 25, and that this money might have been, I think, advanced to him under that power. As to the effect of that transaction, if it had been effected, I reserve my opinion, but looking at the documents that was not the transaction. It was an ordinary loan to the plaintiff (with the consent of his father and the trustees, but nevertheless to him) from the insurance company and on the security of his then contingent interest. I hold, therefore, that duty is exigible on the entirety of the policy money. There will be a declaration in the terms of 1 (a) and 2 (a) of the summons.

Declaration accordingly.

Solicitors: *J. D. Langton & Passmore; Solicitor of Inland Revenue.*

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[1956 R. 2031.]

Will—Construction—“Children”—Whether limited to children in esse—Contingent gift—“Upon youngest child of R. attaining 21 to such of the children of R. as shall then be living”—Policy favouring early vesting—Whether applicable.
Will—Construction—Codicil—Revocation—Direction to accumulate—Invalidity—Destination of income—Under will or as on intestacy.
Trust and Trustee—Maintenance after 21—Exclusion of section of Trustee Act—Contrary intention—Direction to accumulate income—Effect of invalidity of direction—Will—Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 31 (1) (ii), 69 (2).
Accumulation—Invalid direction to accumulate income—Period too long—Period to be substituted—Will—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164 (1).

By clause 23 of her will dated January 20, 1930, a testatrix directed her trustees to stand possessed of the “W.R. Trust Fund” on certain trusts.

By a fourth codicil, as slightly amended by a fifth codicil, dated respectively August 14, 1934, and June 12, 1935, the testatrix, after reciting that she was desirous of making some provision for the education of the children of her grandson R., directed that the trustees should hold one fifth part of the shares of a company, held by them as part of the W.R. Trust Fund, on trust to pay and apply any dividend declared thereon for or towards the education of the children or child of her grandson R. and she further directed as follows: “and I direct that any part of the income not expended as aforesaid shall be accumulated until the youngest child of my grandson shall attain the age of 21 years. 3. Upon the youngest child of my said grandson attaining the age of 21 years the R. Trustees shall stand possessed of the said one fifth part of the said shares and the accumulated income therefrom upon trust for such of the children of my said grandson as shall be then living and if more than one in equal shares. 4. Should no child of my said grandson attain the age of 21 years my trustees shall hold the said shares and the accumulated income thereof upon the trusts declared in my said will of and concerning the W.R. Trust Fund. 5. In all other respects I confirm my said will as altered by the said first second and third codicils thereto.”

The testatrix died on July 6, 1935. Her grandson R. had, by his first marriage, a son D., who was born in 1930, and a daughter, who died an infant and unmarried. By his second marriage in 1953 there were, at the date of these proceedings, no children:—

Held, (1) that, although the policy of the law favoured early vesting where someone could say on the natural construction of the

will that his share had absolutely vested in interest and possession, but it could not be said exactly what share as a matter of quantum had so vested, a contingent gift should not be construed to make the gift vest artificially at a date earlier than that contemplated by the testator; and that, accordingly, on the true construction of the fourth codicil it was the testatrix's intention that all children of R., whenever born, should be educated out of the fund; and that when the youngest attained 21 the fund was to be divided among all R.'s children then living; and that, accordingly, the shares did not vest absolutely in D. on his attaining the age of 21.

In re Manners, decd. [1955] 1 W.L.R. 1096; [1955] 3 All E.R. 83 distinguished.

Kevern v. Williams (1832) 5 Sim. 171; *Elliott v. Elliott* (1841) 12 Sim. 276, and *In re Coppard's Estate* (1887) 35 Ch.D. 350 not followed.

(2) That the direction to accumulate infringed the rule against accumulations and that, applying the provisions of section 164 (1) (b)¹ of the Law of Property Act, 1925, the period of accumulation in the present case was a term of 21 years from the death of the testatrix.

(3) That D. was not entitled, pending vesting, to the income of the shares and accumulations accruing in the period from the expiry of 21 years from the death of the testatrix until R.'s youngest child should attain 21, for the direction to accumulate was a contrary intention excluding the incorporation of section 31 (1) (ii)¹ of the Trustee Act, 1925, into the will.

¹ Law of Property Act, 1925, s. 164 (1): "No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:—(a) the life of the grantor or settlor; or (b) a term of 21 years from the death of the grantor, settlor or testator; or (c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator; or (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated. . . ."

Trustee Act, 1925, s. 31 (1): "Where any property is held by trus-

tees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—[(i) gives power to the trustees to apply income for maintenance, education or benefit] (ii) if such person on attaining the age of 21 years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest. . . ."

S. 69 (2): "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

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(4) That such income was not undisposed of and did not pass as on an intestacy, but must be held on the original trusts declared by the will concerning the W.R. Trust Fund.

Ward v. Van der Loeff [1924] A.C. 653; 40 T.L.R. 493 applied.

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By clause 24 of her will dated January 20, 1930, the testatrix, Elizabeth Ransome, directed her trustees to divide her residuary estate, as to £12,000, part thereof, into three shares of £4,000 each, and, as to the remainder, into four equal shares; and after giving one of such shares and the sum of £4,000 to each of her two daughters, Ethel Margaret Gray and Olive Hirtzel, she directed that the remaining two shares and the sum of £4,000 should be transferred to "the said Ethel Margaret Gray, Edward "Coleby Ransome, Charles Noel Moberly and Herbert Green-wood Wrigley (hereinafter together called 'the Ransome "trustees') to be held by them upon the trusts hereinafter "declared."

By clause 25 the testatrix directed: "In the division of my "residuary estate my trustees shall allocate my ordinary shares "in Ruston & Hornsby Ltd. . . . in equal portions as nearly as "may be to the four shares into which my residuary estate is to "be divided as aforesaid."

By clause 27 she directed the Ransome trustees to invest in their own names one of the shares in her residuary estate (which with the investments for the time being representing the same was thereafter referred to as "the Wilson Ransome Trust "Fund") and should out of the income thereof pay to the said Ethel Margaret Gray the sum of £50 per annum until the youngest of the children "of my late son Charles Wilson Ransome "(hereinafter referred to as 'my son Wilson') shall attain the "age of 21 years," and should pay to his widow during her widowhood the annuity therein mentioned, and pay out of the Wilson Ransome Trust Fund a sum towards the education of her grandson Wilson Arthur Ransome so long as he should remain a pupil at Haileybury College.

By clause 28 the testatrix directed as follows: "Subject to "the payment provided for in clause 27 of this my will the "Ransome trustees shall stand possessed of the Wilson Ransome "Trust Fund in trust for all or any of the children or child of "my son Wilson other than my grandson Robert Charles Ely "Ransome . . . who being male attain the age of 21 years

“or being female attain that age or marry if more than one in “equal shares,” subject (under clauses 29 and 30) to a hotchpot clause and to provisions whereunder the share of each of the testatrix’s grandchildren in the Wilson Ransome Trust Fund was settled on protective trusts for the benefit of each such grandchild during his or her life, and subject thereto on the usual trusts for the issue of such grandchildren with a provision for accruer.

The will contained provisions dealing with the other quarter share in the residuary estate and the said sum of £4,000 to be transferred to the Ransome trustees (called “the Bertram “Ransome Trust Fund”) which are not material.

Clause 35 contained a power of advancement over any part or parts not exceeding a moiety of the expectant, presumptive or vested share of any great-grandchildren in the Wilson Ransome Trust Fund or the Bertram Ransome Trust Fund.

In clause 38 the testatrix recited a mortgage made in her favour by her grandson Robert to secure repayment of a sum of £5,000, which she had advanced to him, and she released the mortgaged property from the mortgage.

After making three codicils to her will, which are not material, she provided, by a fourth codicil, dated August 14, 1934, as follows: “1. Whereas prior to the execution of my “said will I had released my grandson not only from payment “of interest on the advance of £5,000 therein mentioned but “had also released him from repayment of any part of the said “principal sum of £5,000 not secured by the therein mentioned “mortgage I therefore amend the second recital in clause 38 of “my said will so as to read as follows: ‘Whereas I have released “my said grandson from payment of interest on the said “advance and also from repayment of any part of the said “advance not secured by the said mortgage and considering “such release and provision hereinafter made as equal to if not “in excess of any interest he might have received under this “my will had he been given a share in the Wilson Ransome “Trust Fund with the other children of my said son Wilson “I have not made any provision for him out of the Wilson “Ransome Trust Fund.’ 2. Whereas out of the Wilson Ransome Trust Fund . . . I am desirous of making some provision “for the education of the children of my said grandson Robert “Charles Ely Ransome should there be any dividends received “from the shares in Ruston & Hornsby Ltd. to be held by the “Ransome trustees as part of the Wilson Ransome Trust Fund

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“ and by reason thereof the income of such fund should be
“ increased so that payment may be made thereout without
“ injustice to the remaining grandchildren of my said son Wilson
“ Now I hereby direct that the Ransome trustees shall hold 2,015
“ of the shares of Ruston & Hornsby Ltd. held by them as part
“ of the Wilson Ransome Trust Fund upon trust to pay and
“ apply any dividend declared thereon for or towards the expenses
“ of the education of the children or child of my grandson
“ Robert Charles Ely Ransome in such manner as the Ransome
“ trustees shall think best but so that they shall personally see
“ to the payment of the costs and expenses of such education
“ authorized by them and shall not devote any part of the said
“ income in payment for the cost of any education not specific-
“ ally authorized by them and I direct that any part of the
“ income not expended as aforesaid shall be accumulated until
“ the youngest child of my said grandson shall attain the age
“ of 21 years. 3. Upon the youngest child of my said grandson
“ attaining the age of 21 years the Ransome trustees shall stand
“ possessed of the said 2,015 shares in Ruston & Hornsby Ltd.
“ and the accumulated income therefrom upon trust for such of
“ the children of my said grandson as shall be then living and
“ if more than one in equal shares. 4. Should no child of my
“ said grandson attain the age of 21 years my trustees shall
“ hold the said shares and the accumulated income thereof upon
“ the trusts declared in my said will of and concerning the
“ Wilson Ransome Trust Fund. 5. In all other respects I
“ confirm my said will as altered by the said first second and
“ third codicils thereto.”

By a fifth codicil, dated June 12, 1935, the testatrix substituted the words “one fifth part” for the words “two thousand and fifteen” in the second clause of the fourth codicil, and the words “the said one fifth part of the said shares” for the words “the said two thousand and fifteen shares” in the third clause thereof.

The testatrix died on July 6, 1935. She had five children, namely, Ethel Margaret Gray, who died on August 30, 1943, Olive Hirtzel, her son Wilson, who predeceased her, Bertram Coleby Ransome, who predeceased her, and her daughter Mildred Sims, who also predeceased her.

The testatrix's son Wilson had seven children, namely, Gerald Lionel Ransome, Godfrey Ransome, Joan Elizabeth Ransome, Virginia Ransome, Robert, and two children, who predeceased her, one of whom died a minor in 1917, unmarried and

without issue, and the other in 1930, unmarried and without issue. The testatrix's son, Bertram Coleby Ransome, had six children.

The testatrix's grandson, Robert, had two children by his first marriage, namely, David Robert Ransome, who was born on June 24, 1930, and Doreen Mary Ransome, who died an infant and unmarried. Robert remarried on November 14, 1953, and there has been no child of the second marriage. At the date of the commencement of these proceedings his second wife was over 40 years of age.

The market value of the investments representing the special fund and the accumulations thereof was, in 1936, approximately £3,562.

This summons was taken out in 1956 by the trustees of the will, who were also the trustees of the Wilson Ransome Trust Fund, to determine (1) whether, on the true construction of the fourth codicil, (a) the shares of Ruston & Hornsby Ltd. and the accumulations of income thereof which, by clause 3 of that codicil, were directed, on the youngest child of the testatrix's grandson Robert Charles Ely Ransome attaining the age of 21 years, to be held on trust "for such of the children of my said "grandson as shall then be living and if more than one in equal "shares" vested absolutely in the defendant "David Robert "Ransome on his attaining the age of 21; or (b) any future "child or children of the said Robert Charles Ely Ransome who "are living when the youngest of such future children attains "the age of 21, will be entitled to participate in such shares "and accumulations; or (c) how otherwise such shares and "accumulations are held."

E. Blanshard Stamp for the plaintiffs.

Nigel Warren (*Nicholas Browne-Wilkinson* with him) for the defendant David Robert Ransome. This defendant, the sole surviving child of Robert Charles Ely Ransome and a great-grandson of the testatrix, is entitled to the whole of the capital of the Special Fund. The difficulty arises from the phraseology used in the fourth codicil. [Reference was made to *In re Manners*.²] The law favours an early vesting whenever possible. It is undesirable for David to be obliged to wait to see whether there will be issue of his father's second marriage. Where there is a doubt as to construction, the court will not adopt one which contravenes the rule against perpetuities or the rule against

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² [1955] 1 W.L.R. 1096; [1955] 3 All E.R. 83.

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accumulations: see Theobald on Wills, 11th ed., p. 512. Section 164 (1) (d) of the Law of Property Act, 1925, fits the present case exactly. The period of accumulation came to an end in 1951, when David reached the age of 21 years: see *In re Watt's Will Trusts*.³ The wording in the present case means "the last "to be born in my lifetime." The gift in clause 3 of the codicil is, therefore, a gift to the last child of Robert to be born in the lifetime of the testatrix, namely, David, on attaining the age of 21: see *Kevern v. Williams*⁴ and *Elliott v. Elliott*.⁵ [Reference was also made to *In re Pilkington*⁶ and *In re Manners*.⁷] Although David is Robert's eldest son in point of birth, he may also be regarded as his youngest son to attain 21, as Robert is unlikely to have more children. It would be unfair to pay away the income to others, when it may ultimately be due to David: see *In re Whitehead*⁸ and *In re Conyngham*.⁹

The law is clearly stated in Jarman on Wills, 8th ed., p. 1682, and it sums up this case. Here it is uncertain whether the vesting has or has not taken place. Where there is a contingent gift, it carries with it the intermediate income, and David, being the only member of the contingent class, is now entitled to be paid the whole of the income. [Reference was made to *In re Gillett's Will Trusts*.¹⁰]

Although the direction to accumulate is a contrary intention (see section 69 (2) of the Trustee Act, 1925), which excludes the incorporation of section 31 (1) (ii) of that Act, section 164 of the Law of Property Act, 1925, invalidates and makes void a direction in the will for accumulation after 1956. So long as income is directed to be accumulated contrary to the section, it is to go to the person who would have been entitled thereto, if such accumulation had not been directed—in the present case, David. [Reference was made to *In re Turner's Will Trusts*.¹¹]

W. A. Bagnall for persons interested in the residue of the Special Fund. As a matter of construction the fourth codicil directs moneys to be applied for the education of all the children of Robert whenever born. None of the artificial rules of construction relating to class gifts is applicable: see Theobald on

³ [1936] 2 All E.R. 1555, 1562.

⁴ (1832) 5 Sim. 171.

⁵ (1841) 12 Sim. 276.

⁶ (1892) 29 L.R.Ir. 370.

⁷ [1955] 1 W.L.R. 1096; [1955] 3 All E.R. 83.

⁸ Judgments of the Court of Appeal, 1955, No. 215.

⁹ [1921] 1 Ch. 491; 37 T.L.R.

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¹⁰ [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893.

¹¹ [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

Wills, 11th ed., p. 293 et seq. *Mainwaring v. Beevor*,¹² *In re Bleckly*¹³ and *In re Manners*¹⁴ are distinguishable. *Kevern v. Williams*,¹⁵ *Elliott v. Elliott*¹⁶ and *In re Coppard's Estate*¹⁷ do not lay down any general principle and are of doubtful authority.

The relevant period for the purposes of section 164 of the Law of Property Act, 1925, is 21 years from the death of the testatrix. Income after the expiration of 21 years from the testatrix's death can only be paid to David if section 31 (1) (ii) of the Trustee Act, 1925, applies. That provision is a power and not an imperative trust and yields to a contrary intention expressed in the will: see section 69 (2) of the Act; *In re Turner's Will Trusts*.¹⁸ Here a contrary intention is to be found in the direction to accumulate and in the limited express directions for education of Robert's children in the fourth codicil. The words in section 69 (2) are "contrary intention" and not "contrary provision," and the will and codicils for this purpose must be construed without regard to section 164 of the Law of Property Act, 1925. *In re Whitehead*¹⁹ and *In re Conyngham*²⁰ dealt with vested gifts and cannot be applied here.

There is no intestacy, but income undisposed of is held on the trusts declared in the will of the Special Fund. The fourth codicil displaces the trusts declared in the will only as far as the trusts in the fourth codicil are effective: *Ward v. Van der Loeff*²¹ and *Duguid v. Fraser*.²² The fourth codicil declares new trusts of a specified part of the Special Fund. Therefore, as those trusts fail, the original trusts take effect on the principle of *Lassence v. Tierney*.²³ See also *Fyfe v. Irwin*.²⁴

H. E. Francis for the defendants Olive Hirtzel and Robert Charles Ely Ransome (parties interested in the event of an intestacy). Revocation by codicil has been considered in *In re Murray*.²⁵ Clause 4 of the codicil shows an intention that the fund in the codicil is not to return to the will, except in the event stated, namely, that of no child attaining the age of 21. In view of clause 4, the words "youngest child" ought to be read as

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¹² (1849) 8 Ha. 44.

¹³ [1951] Ch. 740, 749; [1951] 1 T.L.R. 902; [1951] 1 All E.R. 1064.

¹⁴ [1955] 1 W.L.R. 1096; [1955] 3 All E.R. 83.

¹⁵ 5 Sim. 171.

¹⁶ 12 Sim. 276.

¹⁷ (1887) 35 Ch.D. 350.

¹⁸ [1937] Ch. 15; 52 T.L.R. 713; [1936] 2 All E.R. 1435.

¹⁹ Judgments of the Court of Appeal, 1955, No. 215.

²⁰ [1921] 1 Ch. 491; 37 T.L.R. 420.

²¹ [1924] A.C. 653; 40 T.L.R. 493.

²² (1886) 31 Ch.D. 449.

²³ (1849) 1 M. & G. 551.

²⁴ [1939] 2 All E.R. 271.

²⁵ [1956] 1 W.L.R. 605, 609;

[1956] 2 All E.R. 353.

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"youngest or only child." Here David has attained 21 and the codicil displaces the trusts of the will. [Reference was made to Jarman on Wills, 8th ed., pp. 379, 380, and to *Winckworth v. Winckworth*²⁶ and *Bective v. Hodgson*.²⁷]

The period of accumulation is 21 years after the death of the testatrix. The accumulation here is not directed to minority, but to the date on which the youngest child attains 21. The principle is stated in *In re Edmonson's Estate*.²⁸

Warren in reply. For the meaning of "youngest child," see *Emery v. England*.²⁹ With regard to the point on section 31 of the Trustee Act, 1925—that the income should be paid to David pending the vesting of his interest—it is necessary to look first at section 164 of the Law of Property Act, 1925. [Reference was made to *In re Turner's Will Trusts*.³⁰]

[The hearing was adjourned to enable the point arising on section 31 of the Trustee Act, 1925, to be argued on behalf of David.]

Warren. It is established by *In re Turner's Will Trusts*³⁰ that section 31 (1) (ii) of the Trustee Act, 1925, is part of and ancillary to the powers of maintenance thereby conferred on the trustees, and that, having regard to section 69 (2) of that Act, it applies as an additional power "if and so far only as a contrary intention "is not expressed in the instrument, if any, creating the trust." Even if a direction to accumulate is a contrary intention, section 164 of the Law of Property Act, 1925, makes void the direction for accumulation after 1956 at the latest; consequently, by the operation of section 69 of the Trustee Act, 1925, section 31 of that statute becomes applicable. So long, therefore, as income is directed to be accumulated contrary to section 164 of the Law of Property Act, 1925, it must be received by the person or persons who would have been entitled thereto if such accumulation had not been directed—in the present case, David.

Cur. adv. vult.

Feb. 22. UPJOHN J. read the following judgment.

This summons raises a number of interesting points on the effect of a gift contingent on a youngest child attaining 21 and on the Thellusson Act, now section 164 of the Law of Property Act, 1925.

²⁶ (1845) 8 Beav. 576.

²⁷ (1864) 10 H.L.C. 656.

²⁸ (1868) L.R. 5 Eq. 389.

²⁹ (1796) 3 Ves. 232.

³⁰ [1937] Ch. 15.

The problems arise on the true construction of the fourth codicil, as slightly amended by the fifth codicil, dated respectively August 14, 1934, and June 12, 1935, of Elizabeth Ransome, who died on July 6, 1935, but a brief recital of parts of her will dated January 20, 1930, is first necessary. [After stating the effect of clauses 24, 25, 27 and 28 of the will his Lordship continued:]

There followed in clauses 29 and 30 certain provisions for hotchpot and a settlement of the grandson's shares on protective trusts for the benefit of each such grandchild, and, after the termination of such trusts, on trust for the children or child of such grandchild as he should appoint and in default of appointment equally.

So far no difficulty arises.

The effect of the fourth codicil was to settle 2,015 Ruston & Hornsby shares on certain trusts, but by the fifth codicil the testatrix directed that, in lieu of that figure, there should be substituted the words "one-fifth part," and I will therefore read the fourth codicil as modified by the fifth codicil:—[His Lordship read the fourth codicil as modified by the fifth codicil and continued:]

This fund of Ruston & Hornsby shares has, in argument, been called the Special Fund and I will so describe it.

As appears from the will, the testatrix had a number of children, including her son Charles Wilson Ransome who had predeceased her. Another of her children is the defendant Olive Hirtzel, who is interested on an intestacy.

Now Charles Wilson Ransome left five children, who survived the testatrix, that is the second to fifth defendants inclusive, and the seventh defendant, Robert Charles Ely Ransome, whom I will call "Robert," who is also interested on an intestacy. Robert has been twice married. Of the first marriage there were two children, the first defendant, David Robert Ransome, whom I will call "David," who was born on June 25, 1930, and a daughter born in 1932, who died in 1948 an infant and unmarried.

Mr. Warren, for David, claims that on the true construction of the fourth codicil, which I will call "the codicil," he is absolutely and indefeasibly entitled to the whole capital and income of the Special Fund, for he submits that the gift in clause 3 of the codicil is only to Robert's children born in the lifetime of the testatrix and takes effect on the youngest of such children attaining the age of 21; David being the only child living at the testatrix's death who has attained 21 is therefore

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solely entitled. In support of this argument he submits that the Special Fund was primarily concerned with the education of Robert's children and that the testatrix had in mind only the children born in her lifetime. He points to the comparable provisions in relation to the education of Wilson Arthur while at Haileybury. He points out, truly enough, that at the time of the will Robert had no children, but that at the time the codicil was executed he had two. I am quite unable to accept this submission. As a matter of language the relevant terms of the codicil seem to me to be reasonably clear. A gift for such of the children of A as shall be living at a given date *prima facie* means all the children of A whenever born who are living at that date. I see nothing in the provisions for education in clause 2 to preclude the application of income of the Special Fund for the education of the children of Robert whenever born. Indeed, the direction to accumulate the balance of income not expended until the youngest child of Robert should attain 21 (and for the purpose of construction I ignore section 164 of the Law of Property Act, 1925) seems to indicate clearly that the testatrix intended that all children of Robert whenever born should be educated out of the fund. Then when the youngest attained 21 the fund was to be divided among all his children then living. I therefore reject that submission.

Then it is said that the policy of the law favours early vesting and that I must apply some artificial construction which compels me, notwithstanding the conclusion I have reached as to the meaning of the language used by the testatrix, to hold that the class of Robert's children to take under the provisions of the codicil closed on the death of the testatrix. I have been referred to a number of authorities and it must be conceded that the policy in favour of early vesting has created certain artificial rules of construction. Thus an immediate gift to all children of A is (contrary to its natural meaning) construed as a gift to the children living at the death of the testator, to the exclusion of after born children. That is purely a rule of convenience. A recent example of the application of that rule is to be found in *In re Manners*,¹ where I held that a direction only to distribute the share on the youngest attaining 21 did not evince a contrary intention to displace the rule, it being conceded that the gift vested absolutely on the death. A similar rule of construction operates when there is a gift to a class after

¹ [1955] 1 W.L.R. 1096.

a life interest. There the class closes when the life interest drops. Another example of the result of this policy of law is to be found in the well-known rule in *Andrews v. Partington*.² Where there is a class gift to the children of A when they attain 21, the class closes when the eldest child attains 21. If the gift is after a life interest the closing of the class is postponed accordingly. That rule is said to be based partly on convenience and partly on an inconsistency in a gift to all the children of A when they attain 21, for a child attaining 21 has a right to demand his share, see *Mainwaring v. Beevor*.³

These rules are applied to enable a member of the class who has a share vested absolutely both in interest and possession to receive his share, and that seems to me to be the whole reason for these rules. Thus, for example, if in the case of an immediate gift to the children of A, there is no child in existence on the death of the testator, the rule is not applied and it appears that the class remains open and the gift is given its natural construction, so as to include all the children of A whenever born, see *Mainwaring v. Beevor*³; *In re Bleckly*.⁴ It is said, however, that there are certain authorities which enable and indeed compel me to depart from the language that the testatrix has used. The first of these in point of time is *Kevern v. Williams*,⁵ where there was a gift for the grandchildren of C to be by them received in equal proportions when they should severally attain the age of 25 years. In a very short judgment Shadwell V.-C. said that those only of the grandchildren were to take who were in esse at the death of the tenant for life. This case has not escaped criticism, but a possible explanation of it seems to me that the Vice-Chancellor may have treated the gift as vesting at the death, but the time of payment was postponed until each should respectively attain 25 years. In support of that view it may be pointed out that in the next case which I must mention, *Elliott v. Elliott*,⁶ which was decided some nine years later, Mr. Knight Bruce could hardly have failed to cite it in support of his argument before the same Vice-Chancellor, had he thought that it was the case of a gift contingent on attaining 25. If that is not the true explanation of it then it is open to the same criticisms which have been directed at the case of *Elliott v. Elliott*,⁶ where there was a gift to all

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² (1791) 3 Bro.C.C. 401.³ (1849) 8 Ha. 44.⁴ [1951] Ch. 740, 749; [1951] 1

T.L.R. 502; [1951] 1 All E.R. 1064.

⁵ (1832) 5 Sim. 171.⁶ (1841) 12 Sim. 276.

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and every the children of the testatrix's daughter in equal shares when they should attain 22. Shadwell V.-C. said in a very short judgment: "I see no objection, in principle, to holding "that by the description 'all and every the children, sons and "daughters of my daughter Elizabeth Elliott,' the testator "meant those children who were then living or might be living "at his death; and then there is no objection to the gift." In that case the gift was undeniably contingent and it has been much criticized on the ground that it was an attempt to get round the rule against remoteness. Wigram V.-C. criticized it on that ground in *Mainwaring v. Beevor*,⁷ as did Chitty J. in *In re Wenmoth's Estate*.⁸ Stirling J. followed it with obvious reluctance in *In re Coppard's Estate*.⁹ He did so on the ground that it had stood for over 40 years without being dissented from or even doubted, and he felt that it was for the Court of Appeal to set it aside and not him. Apparently he was not referred to the criticism of the case in *Mainwaring v. Beevor*.¹⁰ *Elliott v. Elliott*¹¹ was further criticized in the Irish case of *In re Pilkington*.¹² Sir Andrew Porter M.R. expressed the view that it was not rightly decided, but he was able to distinguish it from the case before him and he said this: "He" (the testator) "can of course "make the shares payable on the youngest child attaining age; "and if he does so, the court has no power to depart from his "directions. In such a case all the children whenever born "who attain the prescribed age participate."

It seems to me reasonably clear that *Kevern v. Williams*,¹³ unless explicable for the reason I have suggested, and *Elliott v. Elliott*¹⁴ were wrongly decided as a matter of construction of the language used. It is to be noted moreover that both cases were susceptible to the rule in *Andrews v. Partington*,¹⁵ even then well settled, but, of course, it would not, as the law then stood, have saved them from the law relating to remoteness. However, I do not have to consider whether, however reluctantly, I should pay lip service to the lapse of time and follow *Elliott v. Elliott*¹⁴ and *In re Coppard's Estate*¹⁶ for the reason that the cases do not purport to lay down any principle of construction, and the words I have to consider, as Sir Andrew Porter pointed out, are completely different.

⁷ 8 Ha. 44.

⁸ (1887) 37 Ch.D. 266.

⁹ (1887) 35 Ch.D. 350.

¹⁰ 8 Ha. 44.

¹¹ 12 Sim. 276.

¹² (1892) 29 L.R.Ir. 370, 377.

¹³ 5 Sim. 171.

¹⁴ 12 Sim. 276.

¹⁵ 3 Bro.C.C. 401.

¹⁶ 35 Ch.D. 350.

Apart from these three cases, the policy of the law favouring early vesting has never been applied to any case except where there is someone in existence who can say upon the natural construction of the language of the will that his share has absolutely vested in interest and possession, although it cannot be said exactly what share as a matter of quantum has so vested. In that case the policy of the law has led to the formulation of certain rules to permit the artificially early closing of the class. Apart from the line of cases I have just reviewed, which, as I have said, seem to me wrongly decided, no court, so far as I am aware, has ever misconstrued a gift, while still wholly contingent, to make the gift vest artificially at a date earlier than that intended by the testator, and I see no reason for introducing any such rule based on the unsound foundation of those cases.

Accordingly, the will must operate according to the meaning of the words used, which I need not recapitulate.

The next question is as to the impact of the rule against accumulations on the direction to accumulate until the youngest child attains 21. Plainly, that direction infringes the rule and it is necessary to determine for what period the term is valid. The test is stated to be that you have first to determine which of the four periods set out in section 164 the testatrix has seemingly selected, determining that question according to the language employed and the facts of the case; see *In re Watt's Will Trusts*.¹⁷ That seems to me an artificial and difficult test. The trouble in this case and in most cases dealing with the rule against accumulations is that the testatrix has given directions clearly not having the rule in mind at all. The competing periods in this case are section 164 (1) (b), a term of 21 years from the death of the testatrix, which brings the period of valid accumulation to an end on July 6, 1956, on the one hand, and, on the other, sub-paragraph (c) of the section, the duration of the minority or respective minorities of anyone living at the death of the testatrix. If that period is selected, it is submitted that it came to an end when the eldest child, David, attained 21 on June 24, 1951.

Neither sub-paragraph fits in, in the least degree, with the directions of the testatrix. However, in directing accumulations until Robert's youngest child should attain 21, the testatrix can hardly have contemplated that the period of accumulations would in fact come to an end by the attainment by Robert's eldest

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¹⁷ [1936] 2 All E.R. 1555, 1562.

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child of the age of 21 years, and I propose to hold that subparagraph (b) is the relevant paragraph; the difference is not of great importance.

The next question, and it is a difficult one, is as to the destination of income from the expiry of 21 years from the death of the testatrix until it is known when the gift vests.

Now it is conceded that the Special Fund is either a contingent residuary gift, or, having regard to clause 24 of the will, a contingent specific gift and, accordingly, apart altogether from the direction to accumulate, the ultimate gift carries the intermediate income. On this point, Mr. Warren submits that David, being the only member of the contingent class, is now entitled to be paid the whole income, and he does so on three grounds. First he relies on a passage to be found in Jarman on Wills, 8th ed., p. 1682. It is in these terms:

“In cases where property is given to a class of persons contingently on their attaining a certain age or marrying, questions sometimes arise as to the destination of the income while the ultimate constitution of the class is uncertain. So far as gifts of residue or of an income-bearing fund are concerned, the rule is clearly settled that each contingent member is entitled to the income of his contingent share; and this is so whether the class is capable of increase or not.”

Read quite literally, that does support Mr. Warren's submission, but I have been referred to the cases referred to in support of that passage. They do no more than state another well-known rule of convenience, that, where the share of one or another member of a class has vested, the income of that share may be paid to one or more members of that class, notwithstanding that the class is capable of increase or decrease. It has no application to the case where no share can be said with certainty to have vested. The well-known rule that a contingent future specific or residuary gift carries the intermediate income, unless a contrary intention is expressed in the will, does not entitle a member of the class whose share has not vested to claim payment of income before vesting. The rule means no more than this, that the income must be accumulated for the benefit of the class as a whole, again subject to the rule as to members whose shares have vested, in order that it may be seen who in fact are ultimately entitled to the corpus and accumulations. When the law intervenes to prevent further accumulations, then the income will in general pass to residue or on an intestacy, as the case may be.

Mr. Warren's second point is that it may well be found that on the death of Robert, David, although his eldest son in point of birth, is also the youngest son to attain 21, for Robert may have no further children. That involves reading "youngest child" as including the "only surviving child," but it may be the correct construction having regard to the fourth clause of the codicil. I will assume, though I certainly do not decide, that David can qualify as a youngest son if he has no younger brothers or sisters who attain 21, and, if that does prove to be the ultimate event, it will follow that David is found to be solely entitled. Nevertheless, it is clear that the gift today is still contingent and not vested, for David cannot today claim to be living at the time of Robert's youngest child attaining 21. However, as that may be the ultimate event, Mr. Warren submits that it would be unjust to pay away the income to others when it may ultimately be due to David. He relies on an unreported case in the Court of Appeal called *In re Whitehead*,¹⁸ decided on June 16, 1955 (Judgments of the Court of Appeal, 1955, No. 215). As Sir Raymond Evershed M.R. said at the top of page 19 of his judgment: "The circumstances of this case are special and the language is highly special." I propose to make only a very brief but, I hope, for my purpose, a sufficiently correct statement of the singularly complicated facts and documents. The court found as a matter of construction that, under a deed of compromise, a fund of £25,000 was settled on trust to pay the income to Sir George and his successors in a certain baronetcy born in the lifetime of the first baronet, who died in 1917. The fourth baronet died in 1953 and was succeeded by his son, Sir Rowland, who was not born in the first baronet's lifetime. Subject to the gift of income Sir Rowland took a vested interest in the fund, but the trouble was that there were in existence an uncle and a cousin both born in the lifetime of the first baronet, one or both of whom in succession might succeed to the baronetcy after Sir Rowland, and each of whom would then take a life interest in the settled sum during his tenure of the baronetcy. Thus there was a gap in the trusts of income, for the draftsman had failed to provide for the events which had happened, namely, the succession to the baronetcy of a person not born in the first baronet's lifetime, while possible successors who were so born were alive. The court, by analogy with *In re Conyngham*¹⁹ (itself a case of vested remainders), held that the income ought

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¹⁸ Judgments of the Court of Appeal, 1955, No. 215.

¹⁹ [1921] 1 Ch. 491, 498.

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to be paid to Sir Rowland. The Master of the Rolls drew attention to the judgment in *In re Conyngham*,¹⁹ and particularly to the citation of a passage in Jarman on Wills (1st ed., p. 513; cf. 8th ed., p. 729), a passage again dealing with vested remainders, and said:

“ I base myself first and last really, I think, upon this, that “ there is here, as I construe the document, a vested remainder “ in favour of the person taking on the 31st December, 1953, “ videlicet, Sir Rowland, liable however to be divested in favour “ of a life tenant or tenants and possibly in favour of other “ persons in the event, which has not yet happened, of the “ death of Sir Rowland and also of his twin without issue to take “ during the lifetime of his uncle or his cousin or both of them.”

Plainly, that case has no direct application to the present case, where the gift is contingent, but the question is, whether by analogy to that, I ought to apply it to the circumstances of this case. I recognize the possible hardship to David, but it is one of degree. David may succeed to a share of the Special Fund by surviving the attainment by a younger brother or sister of the age of 21 and, if that happens, it is a perfectly ordinary example of a contingent gift taking effect and it is commonplace in such an event that section 164 may have operated to divert some of the income which the testatrix intended to be taken by those who survived the contingency into the hands of others such as residuary legatees or next-of-kin. I do not think that a different result should flow because it may ultimately turn out that David is the person solely entitled. I do not think I can apply a decision such as *In re Whitehead*,²⁰ which depended entirely on the fact that the gift was vested though liable to be divested to contingent gifts. The ordinary rules applicable to income of contingent gifts must be applied, and, as I have already pointed out, after the period allowed by section 164, these rules do not in general give the income to members of the contingent class, while the interests remain contingent.

Mr. Warren's third point arose at the conclusion of argument. I allowed him to take it by leave and the matter stood over in order that counsel might consider it. The point, which appears to be free of authority, is that *In re Turner's Will Trusts*²¹ established that section 31 of the Trustee Act, 1925, is part of and ancillary to the power of maintenance thereby conferred on

¹⁹ [1921] 1 Ch. 491, 498.

²¹ [1937] Ch. 15.

²⁰ Judgments of the Court of Appeal, 1955, No. 215.

trustees and that, accordingly, having regard to section 69 (2) of that Act, it applies as an additional power "if and so far only" as a contrary intention is not expressed in the instrument, if "any, creating the trust, and have effect subject to the terms of that instrument."

Now section 31 (1) (ii) provides that, if a person on attaining the age of 21 has not a vested interest in income of settled property, the trustees shall "thenceforth pay the income of that property . . . to him, until he either attains a vested interest therein or dies, or until failure of his interest."

It is clear that a direction to accumulate is a contrary intention which would exclude the incorporation of this section into the will: see *In re Turner's Will Trusts*²¹ and *In re Watt's Will Trusts*.²² In the latter case this point might have been, but was not, taken. Mr. Warren, in an attractive argument, submits, however, that section 164 invalidates and makes void the direction in the will for accumulation after 1956; therefore, as from that date, there was no valid or effectual direction in the will dealing with intermediate income until vesting, so that there is no contrary intention expressed in the will to oust the primary operation of section 69 making section 31 applicable. In other words, if you look at the effective operation of the will and there is a lacuna in such operation, there is nothing to prevent section 31 from entering and filling it. He submits the same point in a slightly different way by saying that section 164 directs that, so long as income is directed to be accumulated contrary to the section, it is to go and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed. Consequently, if no accumulation had been directed in the codicil, then section 31 would, on the true construction of the will, be an additional power applicable thereto.

It is clearly settled that for the purposes of section 164 you must construe the will as it stands without regard to the statutory limitation and then construe the Act on the dispositions contained in the will. You do not construe the will as though it was to be read with and modified by the Act. Construing the codicil in accordance with that principle it is clear that section 31 (1) (ii) has no application because of the direction to accumulate itself. There is indeed something to be said for the view that section 31 (1) (i) does not itself apply because of the very limited directions given by the testatrix for the education of Robert's children, but

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with that I am not concerned. If that be the true construction of the will, I am at a loss to see on what principle of law those whose interests are still contingent can claim today to be paid the intermediate income as it arises, for there is nothing in the codicil which gives it to them. I do not see how I can ascribe an artificial intention to the testatrix contrary to the terms of her will that those who have attained 21 shall be paid the income. I do not in fact know what the testatrix would have directed had she been informed that part of the accumulations that she had directed was invalid. I am really being asked to read section 69 of the Trustee Act, 1925, as though additional powers applied if there is no "contrary provision" rather than if there is no "contrary intention." On this point Mr. Bagnall makes a submission with which I must deal in greater detail in a moment. He submits that if there is by reason of section 164 a lacuna in the codicil then you must first look to the will and, reading the will and codicil together, see if the income is disposed of by the will. He submits that it is so disposed of. Whether that be right or wrong, it does show the artificiality of trying to read in section 31 of the Trustee Act contrary to the intentions of the testatrix. Accordingly, in my judgment, David fails to establish any right to be paid the income pending vesting.

The last question is whether the income is undisposed of and passes as on an intestacy, or, as Mr. Bagnall submits, under the trusts contained in the will relating to the Wilson Ransome Trust Fund. That is a question of construing the testatrix's testamentary dispositions. The applicable principles of law are clear: first, that the dispositions of a will must not be disturbed more than is necessary to give effect to a revocation by codicil, and, secondly, where there is no express revocation in the codicil but only an implication of revocation by virtue of the terms of the substituted trust, if that trust falls to the ground the implied revocation falls with it: *Ward v. Van der Loeff*.²³ But it is a question of construction in each case.

In this will and codicil there is no express revocation in the codicil of anything in the will. Moreover, by clause 5 of the codicil, the testatrix expressly confirmed her will and other codicils in all other respects, and Mr. Bagnall submits that, in accordance with principle, if the dispositions of the codicil fail of effect, then the will must operate.

On the other hand, Mr. Francis, for those interested on an intestacy, says that the codicil properly construed does in fact

²³ [1924] A.C. 653, 665.

operate as a complete revocation of the relevant part of the will for all purposes. The Special Fund was taken out of the will and the testatrix clearly intended completely to dispose of the whole beneficial interest in that fund in every event except in the event provided for in clause 4, if no child of Robert attains 21, which cannot now happen.

On the whole, I cannot accept that argument. The testatrix expressed the desire to make provision "out of" the Wilson Ransome Trust Fund for the benefit of the children of Robert. If and in so far as she has failed to secure those benefits by appropriate language, in my judgment, the property thereby undisposed of must be held on the original trusts declared by the will concerning the Wilson Ransome Trust Fund, and I must declare accordingly.

Declaration accordingly.

Solicitors: *Warren & Warren for Notcutt & Son, Ipswich.*

J. L. D.

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Revenue—Income tax—Schedule A—Assessment on landlord or tenant—Flats forming part of single house or building—Method of assessment—Whether assessment on tenant or landlord—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. A, No. VII, rr. 8 (c), 12.

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Rule 8 (c) of No. VII of Schedule A to the Income Tax Act, 1918, provides: "The assessment and charge shall be made upon the "landlord in respect of—. . . (c) any house or building let in "different apartments or tenements, and occupied by two or more "persons severally. Any such house or building shall be assessed "and charged as one entire house or tenement."

Rule 12 provides: "Where a house is divided into distinct "properties, and occupied by distinct owners or their respective "tenants, such properties shall be separately assessed and charged "on the respective occupiers thereof."

The taxpayer, who was the tenant of a flat in Knightsbridge, appealed against an assessment on him as occupier for the year 1951-1952 under Schedule A to the Income Tax Act, 1918, in the sum of £201. The ground floor of the property in question comprised four garages. On the first floor there were five flats, of which the taxpayer occupied flat No. 3. The occupier of each of the five flats was the immediate tenant of a common landlord. There was no means of communication through the garages to the first floor. The

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only means by which access could be obtained to the flats was by one of two common staircases and along a balcony, on which the front door of each flat opened. The landlord was responsible for the repair of the balcony and the staircases. Under the terms of the lease relating to the flat in question the lessee paid the sum of £2,750, and agreed to pay the annual sum of £1 payable on June 24 in each year for a term of 22 years from December 25, 1950 (less the last three days).

The taxpayer claimed that under the rules relating to Schedule A the assessment should have been made not on him but on the landlord. The general commissioners found that the flat was part of a single house or building but accepted the contention of the inspector of taxes that rule 12 of No. VII of Schedule A applied, and, accordingly, they confirmed the assessment.

On appeal to Danckwerts J. the assessment was discharged, it being agreed for the purpose of the argument that the five flats constituted a single house, on the ground that it should have been made on the landlord under rule 8 (c).

The Crown appealed:—

Held, that inasmuch as the five flats in question were respectively occupied by the immediate tenants of a common landlord owning a leasehold interest which comprised the entire building, the assessment in question fell to be made under rule 8 (c).

Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd. (1876) 1 Ex.D. 469 applied.

Decision of Danckwerts J. [1956] 1 W.L.R. 1509; [1956] 3 All E.R. 772 affirmed.

APPEAL from Danckwerts J.¹

This was an appeal by the Crown from an order of Danckwerts J. made on December 10, 1956, allowing an appeal by the taxpayer, Robert Alexander Gatehouse, from a decision of the Commissioners for the General Purposes of the Income Tax, who had dismissed the taxpayer's appeal in respect of an assessment made on him as occupier of a flat, No. 3, Kinnerton Yard, London, S.W.1, for the year 1951–1952, under Schedule A to the Income Tax Act, 1918, in the sum of £201.

Before the commissioners there were also appeals by the occupiers of Nos. 1, 2, 4 and 5, Kinnerton Yard in respect of similar assessments made upon them as occupiers of their respective flats; but it had been agreed between the parties that the appeal of the taxpayer should alone be argued before the commissioners and that the decision in his case should govern the remaining appeals.

The following facts appear from the case stated: By a lease dated February 20, 1951, two individuals on behalf of Kinnerton

¹ [1956] 1 W.L.R. 1509; [1956] 3 All E.R. 772.

Estate Co. Ltd., lessors of the premises, in consideration of the sum of £2,750 and an annual rent of £1, demised to Mrs. Helen Grace Gatehouse the flat, No. 3, Kinnerton Yard, for a term of 22½ years from December 25, 1950 (less the last three days). The lessee covenanted with the landlords as follows:—

“ 1. To pay the rents hereinbefore reserved at the times and in manner aforesaid without any deduction whatsoever except for Landlords Property Tax.

“ 2. To pay discharge and perform the land tax (if any) sewers rates main drainage rates and all other taxes charges rates duties assessments impositions outgoings and obligations whatsoever which now are or which shall at any time during the said term be taxed charged rated assessed and imposed upon the said demised premises or any part thereof or upon the landlord or the tenant in respect thereof (Landlords Property Tax only excepted) and in particular will pay to the landlords on demand the proportion of water rate payable in respect of the demised premises. . . .”

The landlords covenanted with the lessee:—

“ (1) To pay the rent reserved by the lease under which the landlords hold the said premises and to perform and observe the lessee’s covenants and conditions therein mentioned so far as the same ought not to be performed by the lessee under this present lease. . . .”

The case stated continued: The taxpayer gave evidence before us as follows and we accepted it:—(a) He is the occupier of No. 3, Kinnerton Yard, the subject-matter of the appeal. (b) The property known as Kinnerton Yard was built to the order of one person. The ground floor comprises four garages. The first floor comprises five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There is no means of communication through the garages to the first floor. (c) The only manner in which access can be obtained to the flats is by one of the two common staircases and by proceeding along the balcony onto which the front door of each flat opens. It is impossible to distinguish from outside where one flat begins and another ends. The roof is a flat slab covering all the flats and there is nothing to tell where the roof of one flat begins and another ends. To light the staircases and balcony there are three wall lights which are maintained by the landlords, who are responsible for the repair of the balcony and staircases. (d) The entrance to the garages and flats is by a common approach from Kinnerton Street through a narrow opening between two buildings into Kinnerton Yard,

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which is covered with tarmac. The yard slopes down from all sides to a central drain for car washing.

The taxpayer's mother, Mrs. Helen Grace Gatehouse, is the lessee referred to in the lease of February 20, 1951. But it was agreed that the taxpayer was in fact in occupation and paid the rent and that for the purposes of this case the taxpayer would be regarded and treated in the same way as though he had been the lessee named in the lease in lieu of his mother, the said Helen Grace Gatehouse. It was further agreed between the taxpayer and the inspector of taxes for the purposes of the present case that the said lease to the taxpayer's mother took effect on the basis that Alan Higham Wright and Harold Vivian Maltby, the persons named in the said lease as the landlords, had entered into the said lease on behalf of Kinnerton Estate Co. Ltd.

It was contended on behalf of the taxpayer that the five flats, Nos. 1, 2, 3, 4 and 5, Kinnerton Yard (or alternatively the said flats together with the garages on the ground floor), comprised a building let in different tenements and that the said flats were at all relevant times occupied by two or more persons severally, and consequently that an assessment for the year 1951-1952 in respect of the said flats or the said flats together with the said garages should have been made on the landlord under rule 8 (c) of No. VII, Schedule A, Income Tax Act, 1918, and that the assessment on the taxpayer should be discharged.

It was contended on behalf of the inspector of taxes: (1) That each of the flats on the first floor, numbered respectively 1 to 5, Kinnerton Yard, constituted a separate house separately assessable for the purpose of income tax, Schedule A, and the taxpayer was properly assessed as the occupier of No. 3. (2) Alternatively, that notwithstanding a decision that the said flats together constituted a single house or building, or formed part of a single house or building:—(a) The occupation by the taxpayer of No. 3 at a rent which was less than the rack-rent conferred upon him a benefit of part of the annual value of that property, which benefit was chargeable to income tax under the charging provisions of Schedule A as "property" and represented his income for tax purposes. (b) Since the remaining tenants possessed similar benefits which were similarly chargeable, the house was divided into distinct properties and occupied by distinct owners within the meaning of the Income Tax Act, 1918, Schedule A, No. VII, rule 12, which in these circumstances excluded the operation of Schedule A, No. VII, rule 8. (c) The taxpayer was therefore

properly assessed and charged in respect of No. 3, Kinnerton Yard as occupier.

The commissioners found that No. 3, Kinnerton Yard was part of a single house or building, but they accepted the alternative contention of the Crown and accordingly confirmed the assessment.

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Cyril King Q.C. and *Sir Reginald Hills* for the Crown. The question is whether the assessment should be made on the landlord under rule 8 (c) or on the tenant under rule 12 of No. VII of Schedule A to the Income Tax Act, 1918. The annual value of this flat is £201, and the assessment was made on the taxpayer pursuant to the general rule applicable to Schedule A, and on that basis he is chargeable to £200, which is his beneficial interest in the lease. It has been agreed between the parties for the purposes of the argument that the five flats in Kinnerton Yard constitute a "house" within the meaning of rules 8 (c) and 12. It is submitted that the taxpayer is an "owner" within the meaning of rule 12. *Danckwerts J.*, applying *Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd.*,² felt constrained to hold that the assessment should have been made on the landlord under rule 8 (c). It is true that in that case the court held that the respective tenants of different suites in a building, which the court held must be treated as a single dwelling-house, ought not to be assessed as occupiers of distinct properties under rule 14 relating to the inhabited house duty, but that duty was solely concerned with occupation; income tax is not so confined. The inhabited house duty was a tax of a fundamentally different character from that of income tax. For the purposes of income tax the answer to the present question depends on ascertaining who is the person who enjoys the annual value of the land. Here the taxpayer occupies his flat at less than a rack-rent, and, accordingly, he enjoys part of the annual value of that property. The other tenants of Kinnerton Yard enjoy similar benefits. Each of them, therefore, enjoys a benefit chargeable to income tax under Schedule A as "property," which benefit represents their income for tax purposes.

On the true construction of the Income Tax Act, 1918, the taxpayer is occupying part of a house divided into "distinct properties," and he is occupying as an "owner" within the meaning of rule 12. The annual value is to be measured in relation to the rack-rent and not on the rent actually payable. To

² (1876) 1 Ex.D. 469.

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say that "landlord's property tax" is a tax on the property of the landlord is a misnomer. It is chargeable on any person who has a proprietary interest in the annual value of the land: see, on the nature of annual value, the observations of Lord Greene M.R. in *Croft (Inspector of Taxes) v. Sywell Aerodrome Ltd.*³ [Reference was also made to sections 1 and 100 of the Income Tax Act, 1918, Schedule A, Nos. VII, VIII, and Schedule D, general rule 1.]

F. N. Bucher Q.C. and *H. H. Monroe* for the taxpayer. The decision of Danckwerts J. was correct both in its conclusion and its reasoning. The Crown approach rule 8 (c) in the wrong manner because they fail to give sufficient weight to the fact that it is designed to facilitate collection of tax. It enables tax to be collected from the landlord where the building in question is let in different tenements and occupied by two or more persons severally. Rule 12 only applies where there is no common landlord. The language of rule 8 (c) precisely fits the facts of this case, whilst that of rule 12 does not, because the words in the latter rule "distinct properties . . . occupied by distinct owners" must refer to distinct *physical* properties. It cannot be suggested that "distinct properties" is a reference to something non-physical, for if it was not something physical it could not be divided and *occupied* by distinct owners. "Owners" is a reference to title. It is only in cases where there are distinct owners of the several physically divided parts of a single building that rule 12 applies. The decision in *Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd.*⁴ covers the present case; decisions in respect of the inhabited house duty are binding in income tax cases except in so far as there is an obvious difference of phraseology in their respective rules: *Towle (Inspector of Taxes) v. Improved Industrial Dwellings Co. Ltd.*⁵ [Reference was also made to section 12 of the Finance Act, 1941.]

Cyril King Q.C. replied.

Cur. adv. vult.

March 22. LORD GODDARD C.J. I will ask Jenkins L.J. to read the first judgment.

JENKINS L.J. referred to the case stated and continued: In view of the commissioners' finding of fact the inspector did not

³ [1942] 1 K.B. 317, 326, 327;
[1942] 1 All E.R. 110; 24 T.C. 126.

⁴ 1 Ex.D. 469.

⁵ [1931] 1 K.B. 263, 277, 284-286,
294, 295; 47 T.L.R. 74; 17 T.C. 231.

pursue his first contention before Danckwerts J. or in this court, and in both courts it was agreed that for the purposes of the argument the five flats (meaning, I understand, the five flats considered apart from the garages) should be taken as constituting a "house" within the meaning of rules 8 (c) and 12. Whatever may be thought of the view of the facts implicit in this agreement, we must, I think, accept it for the purposes of the present appeal, and at all events I think there was evidence to support the commissioners' finding so far as it was to the effect that the five flats constituted "a building" within the meaning of rule 8 (c), "building," in my view, being a term of wider import than "house."

In other respects, the arguments submitted to us are substantially as summarized in the commissioners' statement of the contentions of the parties at the hearing before them.

Mr. Bucher, for Gatehouse, relies on the express and literal terms of rule 8 (c). Here, he says, is a landlord (namely, Kinnerton Estate Co. Ltd.) owning as lessee a house or building (namely, the house or building comprising the five flats); and this landlord has let this house or building in different tenements (in that he has let one of the five flats to each of the five occupying tenants); and this house or building is occupied by two or more persons severally (i.e., by the five occupying tenants each occupying severally and apart from the others his or her particular flat). Thus, says Mr. Bucher, the requirements of the rule are literally fulfilled, with the result that the landlord is assessable in respect of this house or building, which must be "assessed "and charged as one entire house or tenement." It may be said with force that Mr. Bucher's argument on construction is not displaced by the circumstances that the subleases here in question were for terms of upwards of 20 years, and granted for a premium and a nominal rent, and not of the type heretofore more usual in relation to premises of this character, where the term would be likely not to exceed say seven years, and the consideration would be a rack rent without premium; for rule 8 (c) is perfectly general in its terms, and uses the word "let" simpliciter without any qualifying words to indicate that it is only applicable where the different parts of the house or building are let for a term not exceeding some maximum period, or are let at a rack-rent.

To this argument on construction Mr. King, for the inspector of taxes, opposes a submission based on the statutory principles by which the incidence of Schedule A income tax is regulated. He points out that the tax is assessed in the first instance on the

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occupier, whose ultimate liability is, however, commensurate with his beneficial interest. If he is the freeholder he bears the whole tax, for the whole beneficial interest is his. If he holds under a lease at rack rent he has for tax purposes no beneficial interest, and accordingly is allowed to recoup himself the whole of the Schedule A tax paid by him in the first instance by deducting it at the appropriate rate from the rent he pays. In the intermediate case where the occupier holds under a lease at less than a rack rent, he is allowed to recoup himself part of the tax he pays in the first instance by deducting it at the appropriate rate from the rent he pays, which in this case represents part only of the entire beneficial interest. A similar right of passing on a due proportion of the tax is allowed to a mesne landlord as against his immediate superior. This machinery is designed to produce the result that in the end the owner of each part or share (if I may so describe it) of the entire taxable beneficial interest bears the proportion of the entire tax liability corresponding to his part or share of the entire taxable beneficial interest.

From this statement of general principles Mr. King adduces (in effect) the propositions: (i) that on these principles Gatehouse has for tax purposes a beneficial interest in Flat No. 3, to the extent of the difference between the full annual value of the flat less the £1 per annum rent reserved by his sublease; (ii) that on these principles Gatehouse is liable to be assessed to, and liable to pay, Schedule A tax on the entire annual value of the flat, subject to his nominal right to deduct tax at the appropriate rate from the yearly rent of £1 which he pays; (iii) that as liability to tax and beneficial interest go together, it follows from the foregoing that Gatehouse is the owner within the meaning of rule 12 of a distinct property in the shape of his flat carved out of the "house" constituted by the five flats together; (iv) that the same reasoning applies to the other four occupying tenants; and (v) finally, that the case accordingly falls within rule 12, because the house is physically divided into five distinct properties in the shape of the five flats, and each of the five flats is occupied by a distinct owner in the shape of the occupying tenant, each occupying tenant thus becoming assessable to tax by the terms of the rule.

I cannot accept the argument that because under the general principles governing the incidence of Schedule A tax each of the occupying tenants would be liable to tax on his beneficial interest as above described, therefore they are the owners, within the meaning of rule 12, of the distinct properties into which the

house is divided and which they severally occupy. It seems to me that this reasoning inverts the process appropriate to the determination of the question whether rule 12 is or is not applicable. I should have thought the first thing to do is to see whether the five occupying tenants are owners within the meaning of rule 12 of their respective distinct properties, in other words, their respective flats. If they are, then rule 12 applies, and they are taxable accordingly. If they are not, then rule 12 does not apply, in which case they are not taxable under that rule, and grounds for their liability (if any) to the tax must be sought elsewhere.

I think the treatment of the five occupying tenants as owners of their respective flats within the meaning of rule 12 presents great difficulties of construction. It is to my mind reasonably plain from the language of rule 12 that it contemplates two or more distinct owners each owning one of the distinct properties into which the house is divided, each such distinct property being occupied either by its distinct owner himself or by the immediate tenant of its distinct owner. I find it impossible to hold that these requirements are fulfilled in the circumstances of the present case, where the occupying tenant of each of the five flats holds it, not as the immediate tenant of a distinct owner of that flat, but as the immediate tenant of the owner of the leasehold interest in the house or building comprising all five flats, who is the common immediate landlord of all five occupying tenants.

As appears from what I have said above, Mr. King would have it that in circumstances such as those of the present case, where a house is divided into two or more distinct flats severally occupied by the immediate tenants of a common landlord who owns the entire house, the occupying tenant of each flat is, within the meaning of rule 12, a distinct owner occupying one of the distinct properties into which the house is divided if the lease under which he holds reserves less than a rack-rent, but not if the lease under which he holds reserves a rack-rent. I can find nothing in the language of rule 12 to support this distinction.

We were referred, as was the trial judge, to *Attorney-General v. Mutual Tontine Westminster Chambers Association Ltd.*¹ This case was concerned with the inhabited house duty and not with income tax. Nevertheless, it appears to me to provide powerful support for Mr. Bucher's argument in the present case. The court there had to construe certain regulations contained in Schedule B to the Act of 1808, and in particular

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¹ (1875) L.R. 10 Ex. 305; (1876) 1 Ex.D. 469.

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regulations 6 and 14, which were in these terms: "Rule 6. "Where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties: Provided that where the landlord shall not reside within the limits of the collector, or the same shall remain unpaid by such landlord for the space of twenty days after the same is due, the duties so charged may be levied on the occupier or occupiers respectively; and such payments shall be deducted and allowed out of the next payment on account of rent."

Rule 14: "Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively."

It will be seen that of these regulations or rules, No. 6 broadly resembled in intent the present rule 8 (c), while No. 14 was in terms substantially similar to the present rule 12, but, as it seems to me, less explicitly adverse to Mr. King's contention than the last-mentioned rule. I will not repeat the whole of the trial judge's discussion of this authority, but will confine myself to the following quotation made by him from the judgment of Sir George Jessel M.R. in the Court of Appeal. The Master of the Rolls said this²: "It is necessary now to read the 14th rule," and then he read the rule, and continued: "It has been suggested that that rule applied to the present case. But the point, I think, is very plain indeed—'different tenements being distinct properties.' The 6th rule contemplates tenements which are not distinct properties. What is the meaning of 'distinct properties'? Here, again, you must apply the same rules of construction. 'Divided into different tenements in distinct ownerships,' is the primary meaning. Are these distinct ownerships? It is plain they are not, because there is only one landlord and one tenant for each of the tenements; there is a direct letting from the landlord, the owner, to the one tenant below him. If the tenements had been sold to different people, and there had been several demises, it would have been

² 1 Ex.D. 469, 480.

“ a different thing; there would then have been different land-
 “ lords, and perhaps intermediate tenants, and I do not say what
 “ our decision would have been; but that is not the case here;
 “ it is a mere letting; it is not within the 14th rule, because in
 “ no sense can there be distinct properties, there being but one
 “ landlord throughout. There was another argument as to
 “ ‘ distinct properties ’ which I was not quite able to follow. It
 “ appears to have been suggested that the word ‘ property ’ may
 “ be used not in its ordinary sense as showing ownership, but as
 “ showing some distinction of structure, that is, not as describing
 “ the proprietorship but as describing the structural character of
 “ the building. I think that is not the true meaning, but even if
 “ it were, looking at the word ‘ divided ’ and looking at the word
 “ ‘ distinct,’ I should say these tenements were not within the
 “ 14th rule. I do not think that these properties are distinct in
 “ the sense of any severance of that kind; we should want a
 “ physical distinction which everybody could see. Therefore,
 “ taking the Act of Parliament and the rules together, for the
 “ reasons I have given, I think that these seven buildings are
 “ properly described and charged as houses within 48 Geo. 3,
 “ c. 55.”

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That case provides cogent support for the construction of rules 8 (c) and 12 which, apart from any authority, I would myself be disposed to adopt as their true construction, and in my opinion we should follow it.

Mr. King complained of the unfairness of making the landlord liable for the Schedule A tax on a flat in respect of which he was recovering a rent of only £1 a year. On the other hand, Mr. Bucher complained of the unfairness of making the tenant liable without right of recoupment for the Schedule A tax on a flat in respect of which he has paid the capitalized equivalent of a rack-rent in the form of a premium, especially where, as in the present case, the terms of the letting in regard to “ landlord’s property “ tax ” appear to indicate an intention that the Schedule A tax is to be borne by the landlord.

These and other difficulties discussed in the course of the hearing lead me respectfully to suggest that the desirability of amending rules 8 (c) and 12 is a matter which merits the early consideration of the legislature. The united efforts of counsel and the court failed to discern any satisfactory line of demarcation between the two rules, and it seems probable that the wide terms of rule 8 (c) have brought within its scope under modern conditions

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cases which can hardly have been in contemplation when it was originally framed. One might hazard a guess that rule 8 (c) was in origin designed to facilitate the collection of Schedule A tax in cases in which the landlord of an entire house let it off in different "apartments or tenements" on periodic tenancies or short leases at rack-rents. In such cases it might well be difficult or impossible to collect tax from the numerous, and it may be frequently changing, tenants of different parts of the building, and the assessment of the entire tax on the landlord might be the only practicable method of collecting it at all. If confined to lettings of parts of a house or building at rack-rents rule 8 (c) would affect collection only and not ultimate incidence, and the gravamen of Mr. King's argument is that it ought only to affect the former and not the latter.

Be that as it may, we can only construe the rules as they stand, with reference to the facts of this particular case as they stand, and having done so I find that inasmuch as the five flats in the present case are now respectively occupied by the immediate tenants of a common landlord owning a leasehold interest which comprises the entire building, the case as matters now are falls within rule 8 (c). I say nothing as to the possible effect of future changes of interest, which I leave to be dealt with if and when occasion arises.

In conclusion, I would express my regret that the nature of this litigation has, from a procedural point of view quite properly, resulted in a decision adverse to the landlord's interest being reached in the landlord's absence. I suppose (subject to any further appeal) the next step will be an assessment on the landlord. In that event, the landlord would be entitled to appeal, and would not be bound by the agreement between the present parties to the effect that the five flats together constituted a house, or by the general commissioners' findings of fact in this case. For the rest, he would be entitled to argue the whole matter over again, but in so doing would find himself embarrassed, not by way of *res judicata* but by way of precedent, by the adverse decision of this court on the construction of rules 8 (c) and 12.

It would be well if in cases of this kind some method could be devised of enabling the question at issue to be determined in the presence of all parties interested.

For the reasons I have endeavoured to state, I am of opinion that this appeal fails and should be dismissed.

SELLERS L.J. The commissioners held that No. 3, Kinnerton Yard, the premises in respect of which this appeal is brought, were part of a single house or building. That finding was accepted by the Crown before the trial judge and before us, and this appeal must be decided on that basis.

The judge applied rule 8 of the "Rules as to Persons 'chargeable'" in the rules applicable to Schedule A, Case VII. On the basis that the premises were in fact part of a building, as has been agreed, then they would appear to fall within rule 8 (c). The rule, I understand, is accepted as operating in the case of large blocks of flats, whether humble or luxurious, where a rack-rent is paid to the landlord, together with generally, but perhaps not invariably, a sum for rates.

The difference between those accepted cases and this case, the Crown allege, is that in this case the occupier does not pay a rack-rent but holds the premises on a 22 years' lease from Kinnerton Estates Co. Ltd., which he obtained by agreeing to pay £2,750 on entering into the lease, and a yearly rent of £1 payable on June 24, the tenant to pay all rates and taxes assessed or imposed on the premises (landlord's property tax only excepted).

The Crown allege, and the commissioners accepted: (a) that the occupation by the tenant of No. 3 at a rent which is less than the rack-rent, confers upon him a benefit of part of the annual value of that property, which benefit is chargeable to income tax under the charging provisions of Schedule A as "property" and represents his income for tax purposes; (b) since the remaining tenants possess similar benefits which are similarly chargeable, the house is divided "into distinct properties and "occupied by distinct owners" within the meaning of the Income Tax Act, 1918, Schedule A, No. VII, rule 12, which in these circumstances excludes the operation of Schedule A, No. VII, rule 8 (c); (c) the appellant is therefore properly assessed and charged in respect of No. 3, Kinnerton Yard, as occupier. Rule 12 refers only to a house, and it has been accepted by both sides that the whole building, consisting of Nos. 1 to 5, Kinnerton Yard, constituted a "house."

No. 3 is a distinct property in the sense that it is self-contained. All the five residences in Kinnerton Yard would appear to be "distinct properties," and in the course of the argument it appeared to the court that they closely resembled a terrace of houses and might have been regarded as five separate and distinct houses and not part of a house or building at all.

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But if they have to be regarded as "distinct properties" into which a house has been divided and rule 12 is sought to be applied, the question arises whether they are occupied by distinct owners (or their respective tenants).

The rule appears to me to be complementary to rule 8 (c). Rule 8 deals with machinery for collection of the property tax, and where there is a common landlord of a house or building separately let in different apartments or tenements and occupied by two or more persons severally the assessment and charge is to be made on him in the first instance, with recourse to the occupier if the landlord defaults. Rule 12 appears to recognize that even in one house there may be distinct properties and distinct owners (or their tenants), in which case there would not be a common landlord or owner from whom to collect the tax in respect of all the house or building, and therefore such properties must be separately assessed and charged on the respective occupiers thereof.

I would regard rule 12 as of much more restricted application than the Crown has contended here. Even assuming that Mr. Gatehouse is to be regarded as having a benefit of part of the annual value of the property and that it does make him of necessity a "distinct owner" of the property, he and all the other occupiers derive their titles to their distinct properties within the building directly from the common landlord, the Kinnerton Estates Co. Ltd., and these facts to my mind fit rule 8 (c) rather than rule 12.

The assessment of £201 as the annual value of the premises is in fact based on the terms of the lease. Although the rent is only £1 annually the landlord has had £2,750 at the commencement of a tenancy for 22 years. Modern circumstances may have prompted or necessitated this kind of financial arrangement. Its effect seems to be that the landlord enjoys the benefit of part of the annual value appropriated to any "distinct property" and has the bulk of the benefit in advance. If rule 12 can be invoked it would work harshly against the tenant, for, although he has paid £2,750 to the landlords, he only has £1 rent annually from which to deduct the tax, in the manner provided by the tax law.

It is unfortunate that the view of the Kinnerton Estates Co. Ltd., the landlords, has not been, and could not be as the law stands, heard in this case, but in my judgment the judge came to the right conclusion that the assessment should have been made on the landlords under rule 8 (c). I would dismiss the appeal.

LORD GODDARD C.J. I agree with the judgments which have been delivered. We were told that it was hoped that this would be a test case, but we have not been able to hear an argument by the landlords, and I should not be surprised if other commissioners regarded these dwellings as indistinguishable from ordinary terrace houses. It seems, however, inescapable that rule 8 (c) must apply, and I entirely agree with Jenkins L.J. that the rules with which this case is concerned urgently require reconsideration in the light of modern conditions. They seem to me in many respects to be out of date. In 1842, when rule 8 first appeared, flats were, I believe, unknown. The rule was designed to apply to houses let as lodgings or tenements. A tenement house is a well-known term applied to premises which are shared by two or more families and the dwellers therein are often of a transient class, so that it would be impossible to assess anyone to tax except the landlord. Nowadays, more especially since the war, it has become quite common to let flats on long leases in consideration of a lump sum payment, and a ground rent instead of on a rack-rent, and I can see no difference between a flat let on these terms and the long leasehold house which is bought for occupation. The occupier pays the Schedule A and pays ground rent to the landlord under covenant, deducting tax at the standard rate. Whether rule 12 can ever apply except where the freeholder divides up the house and sells the freeholds of the divided parts to separate purchasers we need not now decide, but it is remarkable that there seems to be no case which illustrates the application of that rule. I agree with the order proposed.

Appeal dismissed.

*Leave to appeal to the House
of Lords granted.*

Solicitors: *Solicitor of Inland Revenue; Alexander Rubens & Co.*

J. A. G.

In re A DEBTOR (No. 30 OF 1956).
Ex parte THE DEBTOR v. F. R. HARMAN (A CREDITOR).

*Bankruptcy—Bankruptcy notice—Application to set aside—Grounds—
Whether limited to “counterclaim, set-off or cross-demand”—Time
for application—Application not within three days allowed by*

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rule 138—*Application on ground of satisfaction—Whether rule confined to “counterclaim, set-off or cross-demand”*—*Bankruptcy Rules, 1952 (S.I. 1952, No. 2113 (L. 14)), rr. 31, 137, 138, 139—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1 (1) (g).*

The application of a debtor to set aside a bankruptcy notice, based on the ground of satisfaction, was not presented until seven days after the service of the notice. The registrar refused to set aside the notice on the ground that the debtor had failed to comply with rule 138 of the Bankruptcy Rules, 1952, and make the application within three days of the service of the notice:—

Held, (1) that the court would in proper cases set aside bankruptcy notices on grounds other than those set out in section 1 (1) (g) of the Bankruptcy Act, 1914—“counterclaim, set-off or “cross-demand”—including satisfaction, which was essentially different from those grounds.

In re Easton (1893) 10 Morr. 111; 9 T.L.R. 408 distinguished.

(2) That the time limit of three days imposed by rule 138 was confined to applications under rule 137 based on “counterclaim, “set-off or cross-demand” and did not apply to an application based on “satisfaction”; and that the debtor’s application to set aside the notice could be entertained under the procedure provided by rule 31, which imposed no time limit, and was not, therefore, out of time.

In re Easton (*supra*) distinguished.

MOTION.

On November 5, 1956, a bankruptcy notice was issued against the debtor which required payment of the sum due to be made to Herbert George Empson, the duly constituted and appointed attorney of F. R. Harman (a creditor) under a power of attorney dated May 16, 1956; the sum due was represented as that claimed by F. R. Harman under a judgment obtained by him on October 12, 1954. The notice was served on November 30, 1956. The debtor did not within three days of service make any application to the court to set aside the bankruptcy notice, nor did he make any application to extend the time for so doing. On December 7, 1956, the debtor filed an application to set aside the bankruptcy notice on the grounds set out in his affidavit, namely, that on August 2, 1956, Empson had accepted payment from a third party of the sum of £400 in full and final settlement of all claims, and in particular of the present claim which Empson had, or would have had, against him and had thereby released him from payment.

The registrar found that the debtor in his affidavit had sought relief on the ground of the payment by a third party of the sum of £400 and on no other ground; he decided that the correct

procedure for the debtor to have followed was that in accordance with rules 137–139 of the Bankruptcy Rules, 1952,¹ and that such procedure was obligatory upon him whether the payment was a payment on account or a payment in “satisfaction.” The rules referred to “Form 9,” and that form specifically provided for the cases where the payment was in “satisfaction.” The debtor had failed to take the necessary steps within the three days specified in the bankruptcy notice, and had made no application for extension of the time. His application to set aside the notice therefore failed. The debtor appealed from that decision. The only ground of appeal which calls for a report is that the registrar was wrong in law in holding that the application before him to set aside the bankruptcy notice was an application made under rules 137–139 of the Bankruptcy Rules, 1952, and therefore out of time under the said rules.

Leonard Caplan Q.C. and *Morris Finer* for the debtor. The registrar was wrong in holding that the application to set aside the bankruptcy notice was out of time because it was not made within the three days prescribed by rule 138. The time limit of three days is confined to applications under rules 137–139 based on the grounds of set-off, counterclaim or cross-demand. In the present case the application to set aside was based on satisfaction; that is something quite different from those grounds.

The grounds in rule 137 are the same as those in section 1 (1) (g) of the Bankruptcy Act, 1914, which a debtor can rely on as a reply to a bankruptcy notice founded on a judgment debt:

¹ Bankruptcy Rules, 1952, r. 31: “Except where these rules otherwise provide, every application to the court shall, unless the court otherwise directs, be made by motion supported by affidavit.”

R. 137: “Every bankruptcy notice shall be indorsed with—(a) the name and place of business of the solicitor who is suing out the notice, or, if no solicitor is employed, with a memorandum that it is sued out by the creditor in person; (b) an intimation to the debtor that if he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the

“notice file an affidavit to that effect with the registrar.”

R. 138: “If the notice is served in England the time for filing the affidavit referred to in the last preceding rule shall be three days, and in every other case it shall be such time as the registrar shall fix when issuing the notice.”

R. 139: “(1) The filing of the affidavit referred to in rule 137 shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall, if he is satisfied that sufficient cause is shown, fix a time and place for hearing the application, and shall give not less than three clear days’ notice thereof to the debtor, the creditor, and their respective solicitors, if known.”

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see Williams on Bankruptcy, 16th ed., p. 24. The only judgment on which a creditor can issue a bankruptcy notice is a debt on which execution could be levied: *Ex parte Woodall; In re Woodall*.² Satisfaction could not be a defence to such a judgment, since a writ of execution cannot be levied on a satisfied debt: *Clissold v. Cratchley*,³ per Fletcher Moulton L.J.⁴ See also *In re a Debtor* (No. 37 of 1914).⁵

The registrar may have been misled into thinking that the only grounds on which a bankruptcy notice could be set aside were those in paragraph (g) of section 1 (1) of the Act of 1914. There appears to be some justification for that in Williams on Bankruptcy (see p. 36), and there is a passage in Halsbury's Laws of England, 3rd ed., vol. 2, p. 282, which is similarly misleading unless it is read carefully in conjunction with the footnote. This misapprehension appears to be based on *In re Easton*,⁶ where, in the course of argument, Vaughan Williams J.⁷ stated that the only reasons for which an application to set aside a bankruptcy notice could be entertained were those of counterclaim, set-off or cross-demand set out in section 4 (1) (g) of the Bankruptcy Act of 1883. That principle was accepted in *In re Cole*,⁸ so that the chain of confusion continued. A subsequent note in Williams (16th ed., at p. 623) sets out the true position, namely, that no method is prescribed for applications to set aside a bankruptcy notice on any ground other than those of counterclaim, set-off or cross-demand, but that in practice such applications were frequently made and allowed on other grounds, for instance, payment of the debt or defective service; see also Encyclopaedia of Court Forms and Precedents, vol. 4, p. 109.

There are numerous cases where bankruptcy notices have been set aside on other grounds: thus, in *In re Howes*⁹ a bankruptcy notice was set aside because it was not in accordance with the terms of the judgment and was calculated to perplex the debtor; in *In re Miller*¹⁰ a judgment debtor paid into court a sum in part satisfaction of the debt, and a bankruptcy notice could not issue for the whole debt; and in *In re H. B.*¹¹ the notice was bad because it did not comply with the terms of the judgment.

² (1884) 13 Q.B.D. 479.

³ [1910] 2 K.B. 244; 26 T.L.R. 409.

⁴ [1910] 2 K.B. 250.

⁵ [1914] 3 K.B. 726.

⁶ (1893) 10 Morr. 111; 9 T.L.R. 408.

⁷ 10 Morr. 112.

⁸ [1898] 1 Q.B. 290.

⁹ [1892] 2 Q.B. 628.

¹⁰ [1912] 3 K.B. 1.

¹¹ [1904] 1 K.B. 94; 20 T.L.R. 32.

The correct position is that where the grounds to set aside are those in paragraph (g), then rules 137-139 apply and there is the time limit of three days prescribed in rule 138; but where the application is based on other grounds, there is no such time limit. Such an application can be entertained under rule 31, which imposes no time limit.

Muir Hunter for Herbert George Empson, attorney of the creditor. The principles governing the setting aside of a bankruptcy notice give rise to some difficulty; this question resolves itself into one of jurisdiction and discretion. The indorsement on a bankruptcy notice states that if the debtor has a counter-claim, set-off or cross-demand, he must file an affidavit to that effect within three days of service, and the Act contemplates those three grounds as being the only grounds on which a bankruptcy notice can be set aside: see Williams, p. 622, and form 9, which is stated to be used in connexion with rules 137-139.

It is the duty of the court on the hearing of a petition to investigate the act of bankruptcy relied on, but there is no jurisdiction to attack a bankruptcy notice by going behind the judgment, and there must be some limitation to the burden which is to be imposed on a county court registrar in entertaining applications to set bankruptcy notices aside. Where a notice was issued out of the wrong court, it was not a notice at all, it was nullity: see *In re a Debtor* (No. 21 of 1950); *Ex parte the Debtor v. Bowmaker Ltd.*¹²; the notice there was bad on its face.

R. D. Sheaf for F. R. Harman, creditor. Whatever the decision of the court on this preliminary point the creditor would like the issues to be decided now.

DANCKWERTS J. The point that it is necessary to decide on the Bankruptcy Rules is whether, when the debtor wished to challenge the bankruptcy notice, he was faced with a period of only three days in which to put forward his objection by filing an affidavit in the manner mentioned by rule 138. The registrar decided that the notice of motion was out of time under the provisions of rules 137, 138 and 139 of the Bankruptcy Rules, 1952.

[His Lordship read rules 137, 138 and 139 of the Bankruptcy Rules, 1952, and continued:] The question raised on the notice of motion is that the judgment debt on which the bankruptcy notice was founded was satisfied by a certain arrangement, which it is not necessary to go into for the present purpose.

¹² [1951] Ch. 313; [1951] 1 T.L.R. 174; [1950] 2 All E.R. 1129.

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The point which is taken in the present case is satisfaction, which is said to include the payment in full of the judgment debt on which the creditor relies for the purpose of his bankruptcy notice.

It is contended on behalf of the debtor that satisfaction is something quite different from the three grounds mentioned in rule 137, which are the same as those mentioned in section 1 (1) (g) of the Bankruptcy Act, 1914, namely, that the debtor "has a counterclaim, set-off or cross-demand." He contends that the difference is shown by the fact that the only judgment on which a bankruptcy notice can be founded is one which would permit of execution because there is a reference in the section to there being no stay of execution. If a debt has been satisfied, it is not a debt on which any execution could be levied. Therefore, it is fundamentally different from the counterclaim, set-off or cross-demand which are mentioned in the section and the rules. He contends, on the other hand, that rule 31 is the appropriate rule, which provides: "Except where these rules otherwise provide, every application to the court shall, unless the court otherwise directs, be made by motion supported by affidavit." In respect of that there would not appear to be any time limit whatever.

Counsel for the debtor has referred us to a number of cases in which bankruptcy notices have quite plainly been set aside on motion on other grounds than those mentioned in rule 137 as it at present stands. Such cases are *In re Howes*,¹ *In re H. B.*,² *In re Miller*.³

There are, however, certain matters which may have induced the registrar to come to the conclusion that the application was out of time, because on Form 9, appended to the Bankruptcy Rules, one finds a reference to rule 137 and rule 139, and in the forms of affidavit the first is one which contains the following example: "That I have satisfied the debt claimed," and then the nature of the satisfaction has to be stated. Then as an alternative: "That I have a counterclaim [or set-off or cross-demand]." Those suggest apparently that an application based on satisfaction could be made under rules 137 and 139.

There are passages which are perhaps not very clear in Williams on Bankruptcy, 16th ed., p. 36, and in Halsbury's Laws of England, 3rd ed., vol. 2, p. 282, which suggest rather the same thing.

¹ [1892] 2 Q.B. 628.

³ [1912] 3 K.B. 1.

² [1904] 1 K.B. 94; 20 T.L.R. 32.

There is also *In re Easton*,⁴ a case in which Vaughan Williams J. made some observations in the course of the argument which suggest that an application of this kind made on any other ground than those mentioned in the section and rules was not appropriate. He said⁵: "The court can go behind the judgment "on the hearing of a petition. But where is there any authority "that on an application to set aside a bankruptcy notice the court "has power to go behind the judgment? The earliest case on the "question under the present Act [*Ex parte Lennox*⁶] . . . went "on the words of section 7 (3) of the Bankruptcy Act, 1883, and "was the case of a petition. Those words have no application to "the case of a bankruptcy notice. Where it is a bankruptcy "notice, it seems to me, the only reasons which can be enter- "tained by the registrar are the reasons which are mentioned in "section 4 (1) (g), viz.: that the debtor has a counterclaim, set- "off or cross-demand which he could not set up in the action in "which judgment was obtained." That has been echoed by Wright J. in *In re Cole*.⁷ But it is clear from other cases to which I have referred, in two of which (*In re Howes*⁸ and *In re H. B.*⁹) Vaughan Williams J. was a member of the court, either in the Divisional Court or in the Court of Appeal (when he became a Lord Justice), that the words used by him in *In re Easton*¹⁰ must not be treated as of wide application, because, if those words in that case be taken in their literal sense, they would mean that other applications in which a bankruptcy notice was sought to be set aside could not be entertained, and, therefore, I think he must have been referring to the particular circumstances which were present in *In re Easton*.¹⁰

It seems to me that it is wrong on principle and reason to treat the matter as confined within the strict limits of these rules which allow only three days in which an application to test the validity of a bankruptcy notice is to be made. Satisfaction is essentially different from either counterclaim, set-off or cross-demand, and on the authorities an application of this kind can be entertained under the procedure provided by rule 31.

UPJOHN J. I agree. I think that the authorities make it quite plain that this court will, in proper cases, set aside bankruptcy notices on grounds other than those set out in section 1

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⁴ (1893) 10 Morr. 111; 9 T.L.R. 408.

⁵ 10 Morr. 112.

⁶ (1885) 16 Q.B.D. 315; 2 T.L.R.

⁷ [1898] 1 Q.B. 290.

⁸ [1892] 2 Q.B. 628.

⁹ [1904] 1 K.B. 94.

¹⁰ 10 Morr. 111.

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(1) (g) of the Bankruptcy Act, 1914, namely, a counterclaim, set-off or cross-demand. One of those grounds plainly must be satisfaction, because, if a judgment has been satisfied, as Farwell L.J. pointed out in *Clissold v. Cratchley*,¹¹ there is no judgment left on which to found the bankruptcy notice.

The whole question, therefore, is whether the application to set aside the notice has to be given within the three days mentioned in rule 138. That rule only applies to rule 137, which is dealing with counterclaim, set-off or cross-demand. Satisfaction is quite different from any of those three things. Accordingly, in my view, a notice to set aside a bankruptcy notice on the ground of satisfaction would not have to be issued within the three days specified by rule 138, and I agree that the decision of the registrar must be reversed.

[The hearing of the appeal was continued on the other questions not relevant to this report.]

Appeal allowed on question relating to the notice.

Solicitors: *Saunders, Sobell, Greenbury & Leigh; Tucker, Turner & Co.; Collyer-Bristow & Co. for Band, Hatton & Co., Coventry.*

I. G. R. M.

¹¹ [1910] 2 K.B. 244, 250; 26 T.L.R. 409.

In re KILVERT, DECD.

MIDLAND BANK EXECUTOR AND TRUSTEE CO.
LTD. v. KILVERT AND OTHERS.

[1956 K. No. 131.]

Will — Construction — Statutes of Distribution — Bequest of residue equally between brothers and sister "or their heirs and successors" — Persons entitled as "heirs and successors" — "Successors" — General rule that members of class take as joint tenants — Whether rule ousted by Statutes of Distribution.

A testator, by his will, dated June 4, 1948, gave his wife the use of certain chattels for her life, and then provided that they should be "returned to my brothers and sister or their heirs and successors "at her death." He gave his residuary estate "to be equally

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"divided between my brothers E. and W. and my sister S. or their "heirs and successors. . . ." The testator died in 1954. One brother was alive at the date of the summons, one brother had predeceased the testator leaving a wife and son and daughter, and the sister had survived the testator and his widow, but was now dead. On a summons to determine who was entitled to take under the words "heirs and successors," and in what shares or proportions the persons so entitled took:—

Held, (1) that no distinction should be drawn between the gifts of the personalty and realty, and that those entitled were the persons entitled to the real and personal estate under the law of intestate succession as it had stood since January 1, 1926.

In re Whitehead [1920] 1 Ch. 298; 36 T.L.R. 129 considered.

(2) That the words "heirs and successors" did not constitute such a reference to the Statutes of Distribution as to oust the general rule that members of a class took as joint tenants.

In re Gansloser's Will Trusts [1952] Ch. 30; [1951] 2 All E.R. 936 and *Stockdale v. Nicholson* (1867) L.R. 4 Eq. 359 applied.

Rowland v. Gorsuch (1789) 2 Cox Eq.Cas. 187 and *Booth v. Vickers* (1844) 1 Coll. 6 distinguished.

In re Porter's Trust (1857) 4 K. & J. 188 and *Jacobs v. Jacobs* (1853) 16 Beav. 557 considered.

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ADJOURNED SUMMONS.

By his will, dated June 4, 1948, and made on a printed will form, Richard Kilvert bequeathed to his wife Alice the sum of £1,000 free of duty, an annuity of £400 for life, and the use of his silver and such of his furniture as she might desire for her life. He then provided: "The above to be returned to my "brothers and sister or their heirs and successors at her death." Certain bequests followed, on which no question arose; the will ended: "The residue of my estate to be equally divided "between my brothers Elisha and William and my sister Sarah "or their heirs and successors after all debts, funeral expenses "and duties are paid."

The testator died on September 27, 1954. His widow, Alice, survived him, but had since died on March 4, 1955. The testator's brother Elisha was alive. Sarah survived both the testator and the testator's widow, but had since died on October 29, 1955. William died in the testator's lifetime on July 26, 1953, leaving a widow and a son and a daughter.

The plaintiff, the Midland Bank Executor and Trustee Co. Ltd., as trustee of the will, took out the present summons to have determined: (1) What persons were entitled under the words "heirs and successors" wherever they appeared in the will; and (2) what shares and proportions were to be taken by the class of persons so described.

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Ian Edwards-Jones for the plaintiff, Midland Bank Executor and Trustee Co. Ltd.

D. A. Ziegler for the testator's brother, Elisha. Clearly residue is divisible into thirds, and the first defendant takes one third as he has survived. On the construction of the first reference to "heirs and successors" it is submitted that this is a joint tenancy, because there are no words of severance. It was a gift to the brothers and sister with a substitutional gift if all of them predeceased the testator.

T. L. Dewhurst for the personal representatives of the testator's sister Sarah. The testator's residue is clearly divisible into thirds. As to the first gift, the word "returned" in the will is merely a direction that the property should fall into residue. If the property does not fall into residue, but is an independent gift, then "or their heirs and successors" is a substitutional gift and words of severance must necessarily be implied.

Andrew Goodall for the heir-at-law of the testator's brother William. There is no express authority on the meaning of the phrase "heirs and successors." On the true construction of this will the person entitled to William's share under these words is the person who would have been the heir-at-law of William under the law in force before January 1, 1926, such person taking as *persona designata*. Further, the rights of the heir-at-law are preserved by section 51 of the Administration of Estates Act, 1925, and section 132 of the Law of Property Act, 1925. From Stroud's Judicial Dictionary (3rd ed., vol. 2, p. 1303) it appears that the term "heirs and successors" has been construed in Scotland in *Craw's Trustees v. Craw*,¹ where it was held that a bequest to "heirs and successors" meant to the "heirs of the body."

J. L. Knox for the daughter of William. This bequest does not operate as a gift to the heir of William. Section 132 of the Law of Property Act, 1925, does not come into operation at this stage; before that section can be applied, there must be a clear intention to benefit the heir: see Hawkins on Wills, 3rd ed., pp. 122-124. There is nothing in this will to show an intention on the part of the testator that William's heir should take as a *persona designata*.

The position since December 31, 1925, is that the persons to benefit under this description are the persons entitled on intestacy under Part IV of the Administration of Estates Act, 1925. The words "and successors" are words of substitution and not

¹ (1899) 36 S.L.R. 414.

limitation: see *In re Clerke*² and Hawkins on Wills, at p. 220. In *In re Whitehead*³ the words were not the same, but it was held that the words "or their heirs" were words of substitution and not limitation. In *Wingfield v. Wingfield*⁴ it was held that "or" was a word of substitution, and could not be read "and." Examination of those cases shows that the present is nearer to *In re Whitehead*⁵ than to *Wingfield v. Wingfield*.⁶

This is a mixed fund case, but since 1925 the devolution of real and personal property on intestacy has been assimilated. There is therefore no distinction between persons entitled to the real or personal property given here. The word "successors" is merely the testator repeating himself, and it only means the person who is to succeed to the testator's property. It is purely a question of grammar.

Nathaniel Micklem, for the widow of William, adopted the argument of Knox.

B. J. H. Clauson for next-of-kin. No meaning can be attributed to this phrase. One argument has been that in construing the will the words "and successors" should be ignored, another is that it means the heir. The passages cited from Hawkins are irrelevant on this point.

The primary meaning of "successors" according to Stroud (vol. 4, p. 2908) is persons who succeed to an interest. The court has to say who are William's "heirs and successors," but if a phrase has two possible meanings, and there is no indication in the will which of those meanings is intended, then it is void for uncertainty. There is no indication in the will which gives the court any indication of the meaning: see *Lowndes v. Stone*.⁷

ROXBURGH J., having stated the facts: I shall first of all construe the residuary clause, at any rate in part. There appears the word "equally" and if, therefore, all three legatees had been alive at the date of the death of the testator or his widow (because I am not going to decide, in the circumstances of the case, which is the material date, as it does not matter), there would have been obviously a division into equal third parts, because "equally" is a word of division. There is no doubt, therefore, that the words "or their heirs and successors" mean "or their respective heirs and successors," or, putting it in another way, "the heirs and successors of each of them respectively."

² [1915] 2 Ch. 301.

³ [1920] 1 Ch. 298; 36 T.L.R. 129.

⁴ (1878) 9 Ch.D. 658.

⁵ [1920] 1 Ch. 298.

⁶ 9 Ch.D. 658.

⁷ (1799) 4 Ves. 649.

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I now go back to the earlier gift which relates to the use of the silver and the furniture; where it is to be noted that there are no words of division; but, in my judgment, the words "or their heirs and successors" could not be reasonably construed if the brothers and sister were to be treated as joint tenants. In spite of the absence of any word of division, I am compelled by the use of the words "or their heirs and successors" to assume that that gift means the same as the gift of the residue, that is to say, to be returned (and I do not pause to consider what that precisely means) to the brothers and sister in such a way that if they were all alive at the death of the widow they would take in equal third shares, and that the words "or their heirs and successors" mean "or the heirs and successors of them respectively." That is the first point.

The next point is this: what is the meaning of the phrase "or their heirs and successors"?—because it is obvious that, as William predeceased the testator, anything given to him must lapse unless somebody can take under the words "or their heirs and successors." If somebody can take, then, of course, the next question is: who can take under those words?

This point is not the subject-matter of any express decision. The property in question consists in part of real estate and in part of personal estate, and there is nothing to convert the real estate into personal estate for the purposes of distribution. Therefore, three different views have been put before me. One is that the person entitled is the person who would have been the heir on an intestacy before January 1, 1926. Another view is that there is no differentiation to be made since 1925 between real and personal estate, and that the persons entitled are those who are entitled to property undisposed of under the existing law of intestate succession. The third view has been that the words "and successors" introduce such a degree of uncertainty as to vitiate not only themselves but their co-partner, the word "heirs," and thus produce an intestacy, on the ground of uncertainty. I may say that before Mr. Clauson referred me to a passage in Stroud's Dictionary which led me to discover a good many other passages in the near neighbourhood, I had thought it possible that the word "successors" might introduce that degree of uncertainty; but what I have discovered (though the matter has not been explored below the surface) is that the court, both in England and in Scotland, has never failed to construe the word "successors," though no doubt it is true that it has received varying meanings in varying contexts. That

circumstance is not material for the present purpose, because if the word can be construed in other contexts, I have no doubt it can be construed in this context, though, of course, that does not mean that it will bear any particular meaning in this context as distinct from some other particular meaning. I think that it would be a disaster if the court really felt itself unable to construe the word "successors" at all. That it does present some difficulties is true, but it has been said many times that the fact that a judge finds the question for his determination difficult does not entitle him to adopt the counsel of despair and say "I cannot reach a decision."

I must now, in order to pursue the other question (namely, whether under this will realty and personalty travel different courses), refer as a starting point to the decision of Sargant J. in *In re Whitehead*.¹ That case does not contain the words "and successors." Therefore, it has no bearing at all on the point that I have just decided, and it has no binding authority in connexion with the point which I am about to decide, but it does provide a good starting point. The testatrix in that case, who died in 1895, by her will gave her residuary personalty and realty, after the death of an annuitant, to her brothers and sister, F., W., J., E. and X. "or their heirs in equal shares and "proportions." Sargant J. held that where, as in that case, the words "or their heirs" were referable to a mixed fund, they were words of substitution and not words of limitation, both in regard to realty and in regard to personalty, and accordingly that personalty went to the statutory next-of-kin and (as far as I can make out) that the realty went to the heir-at-law, though that is not expressly stated. That would, at any rate, be the position as it was in 1920; but what I have to consider is first of all whether that would be true now and, secondly, even if it would be true of a gift to a class or their heirs, it would be equally true of a gift to a class or their heirs and successors. Of course, the important thing that has happened since 1920 is the assimilation of the devolution of real and personal property on an intestacy. No doubt there are certain saving provisions, but I do not think that they have any application to the present case. It seems to me most probable that, at the present time, in the case of a gift to a class of persons or their heirs, both realty and personalty would be distributed in accordance with the present law of intestate succession, making no distinction between realty and personalty. That, I think, is most probable, but I must not put

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it higher, because that is not the position here. I have the words "and successors"; and, in my view, the words "and successors" are words of a much wider and more general application than the word "heirs." There is about them no flavour or savour of realty at all. The word "heirs," of course, historically and in a legal vocabulary has a very strong flavour of realty, though no doubt lay people often use it and have used it in connexion with personalty; but the word "successors" has no such savour. It is no more akin to realty than to personalty; and the phrase is "heirs and successors." In my judgment, that does not mean the same as "heirs or successors," which might have suggested a different construction. I think that where one has the presence of the word "successors" as well as the word "heirs"—and that is what I have to decide—the court will construe those words as referring to the persons entitled to the real and personal estate under the law of intestate succession applicable at the date when the testator died. I have carefully not put those words "law of intestate succession" into a more concrete shape, because I am about to hear argument whether or not a widow comes in. I have therefore carefully avoided being specific. What I have decided is that the real and personal property are treated as one fund for this purpose—that is to say, for the purpose of devolution—and that the law applicable is the law as it has stood since January 1, 1926.

[His Lordship then heard argument on the second question as to the shares and proportions taken by the class of persons described as "heirs and successors."]

Goodall. The gift to William or his "heirs and successors" is a class gift, the general rule in respect of which is that the persons benefiting take as joint tenants. There is no sufficient reference in the will to the Statutes of Distribution to oust that general rule: *In re Gansloser's Will Trusts*.⁸ This question was discussed at length in that case, which followed the principles of *Eagles v. Le Breton*⁹ and showed that one looks at Part IV of the Administration of Estates Act, 1925 (as amended), merely for the purpose of ascertaining who are the persons to take. When that has been decided, those persons take as joint tenants unless there is such a reference to the Statutes of Distribution to prevent the application of the general rule. Thus, in *Walker v. Marquis*

⁸ [1952] Ch. 30; [1951] 2 All E.R. 936.

⁹ (1873) L.R. 15 Eq. 148; 42 L.J. Ch. 362.

of *Camden*¹⁰ it was held that under a gift to "representatives," meaning the persons entitled under the statute, the objects of the gift took as joint tenants, and not in the statutory shares: see *Hawkins on Wills*, 3rd ed., p. 126, and *In re Porter's Trust*.¹¹

Knox. It is also submitted that those taking this gift do so as joint tenants. The cases as to "next-of-kin" are based on considerations of consanguinity and not the Statutes of Distribution. Where there is express reference to the statutes, the beneficiaries naturally take according to the statutes. The same result is reached where there is an implied reference to the statutes, as in a gift of personalty "to A or his heirs": *Jacobs v. Jacobs*.¹² But where, as here, the expression is one which has to be construed by the court as a reference to the persons entitled on intestacy to save the gift from uncertainty, the beneficiaries take as "joint tenants."

Micklem. The shares of the persons taking as "heirs and successors" should be regulated by reference to the Statutes of Distribution. The word "successors" imports not only the class which is to take but the shares to which they are entitled. The main stream of authority is that stemming from *Bullock v. Downes*,¹³ in which case there was an express reference to the Statutes of Distribution. There the statutes not only fixed the class but also fixed the share of each member of the class. But the principle is not limited to cases of express reference to the statutes: see *Theobald on Wills*, 11th ed., p. 321, and *Hawkins*, p. 120.

Although not a technical word, "successors" is an apt word to describe persons to take both realty and personalty devolving together after 1925 under the Administration of Estates Act, 1925, as amended. In *In re Gansloser's Will Trusts*¹⁴ the word was "relations," which is less precise than "heirs and successors." See also *In re Boyer*,¹⁵ where Farwell J. discussed a possible technical meaning of "successor."

The true distinction is between cases where the words in the will refer to the relationship of the class to the testator, and cases where the words refer to the succession of the class to the testator. The word "representatives" is a non-technical word which has been held to introduce a sufficient reference to succession. It is stated in *Jarman on Wills* (8th ed., vol. III, p. 1609) that where representatives mean next-of-kin, the manner and

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¹⁰ (1848) 16 Sim. 329.¹¹ (1857) 4 K. & J. 188.¹² (1853) 16 Beav. 557.¹³ (1860) 9 H.L.C. 1.¹⁴ [1952] Ch. 30.¹⁵ [1935] Ch. 382; 51 T.L.R. 259.

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proportions in which they take are regulated by the statutes unless they are expressly directed to take equally. This proposition is based on *Booth v. Vicars*¹⁶ and *Rowland v. Gorsuch*.¹⁷ In the latter case the words were "descendants or representatives," which are very like successors. On the other hand, where representatives mean the true next-of-kin, they take as joint tenants: see *Stockdale v. Nicholson*.¹⁸ The distinction in that case was between personal representatives and next personal representatives, and it was held that next personal representatives meant next-of-kin and that they took as a class for want of words of division. Again, gifts of personalty to "heirs" have been held to import the statutes for the purpose of ascertaining both the class and the share of each member: *In re Porter's Trust*¹⁹; *Jacobs v. Jacobs*.²⁰ The latter case was expressly approved in *Bullock v. Downes*.²¹

ROXBURGH J. This point has been notable for the able arguments which have been presented to me; and, indeed, it is a point worthy of such arguments, because it is one of those artificialities in which equity delights and confounds many people.

The words which I read for the first part of my judgment are: "The residue of my estate to be equally divided between 'my brothers Elisha and William and my sister Sarah or their 'heirs and successors.'" I have already held that the words "heirs and successors" are not void for uncertainty, but indicate the class of persons who would be entitled to take the property under the law of intestate succession as it stood at the date of the death of the testator; that is to say, the legislation of 1925, as since amended. I arrived at that conclusion to avoid declaring the substitutional gift void for uncertainty, a view which at an early stage of the argument I was inclined to hold, because the word "successors" might mean persons who succeeded under wills, persons who succeeded *de facto*, and indeed would, I think, unless confined in some way, be a word which would be void for uncertainty; but it is a fact that the courts, not only in this country but elsewhere, have restricted the meaning of the word "successors" in order to avoid holding the word "successors" or similar phrases void for uncertainty, and the fact that they have not always restricted the words in the same way is, for the present purpose, quite immaterial. The

¹⁶ (1844) 1 Coll. 6.¹⁹ 4 K. & J. 188.¹⁷ (1789) 2 Cox Eq.Cas. 187.²⁰ 16 Beav. 557.¹⁸ (1867) L.R. 4 Eq. 359.²¹ 9 H.L.C. 1.

point is that they have restricted them in some way or another to avoid uncertainty.

The question that I have now to determine is: in what shares and proportions do the members of the class take? In other words, do they take as joint tenants (because the words "to be equally divided" obviously refer only to the first three named persons and there is no indication of any severance as between the heirs and successors) or do the heirs and successors take in the shares and proportions indicated by the law of intestate succession?

This subject has been illuminated, but not entirely clarified, by a recent decision of the Court of Appeal, *In re Gansloser's Will Trusts*.² The word in question there was "relations." Evershed M.R., having first of all discussed and decided the meaning of the word "relations," said³: "How, having found 'this class of persons, is the distribution to take effect?' Then, omitting some words, he said³: ". . . it all depends on the 'extent and significance of the reference that the rule'—that is the rule of construction which confines the word 'relations' to an ascertainable class—"instructs you to make to the Statutes 'of Distribution.'" Then, after referring to a number of cases, the Master of the Rolls cited from the judgment of Lord Romilly M.R. in *Eagles v. Le Breton*⁴ these words⁵: "'It was true that 'when there was an express reference to the statutes they 'would take as tenants in common in the shares in which they 'would have taken on an intestacy. But when there was no 'express reference to the statutes the case was different. 'There was nothing then to prevent the ordinary rule from 'applying, that under a gift to a class without words of 'severance, all the members of the class take as joint 'tenants.'" I must observe, as regards that passage, that it is very broadly stated and was certainly at variance with a large number of cases which had been decided before the date of Lord Romilly's judgment; but the passage, as distinct from the previous statement of authority, is unambiguous. An express reference to the statutes is needed to oust the general rule that the members of the class take as joint tenants.

It seems quite clear that the present Master of the Rolls adopted that statement of principle, because he said⁶: "There

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² [1952] Ch. 30; [1951] 2 All E.R. 936.

³ [1952] Ch. 39.

⁴ (1873) L.R. 15 Eq. 148; 42 L.J. Ch. 362.

⁵ [1952] Ch. 42.

⁶ Ibid. 43.

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“ is here, according to the language of the testator himself, no reference to the Statutes of Distribution: the statutes are introduced because the court, in order to save the will, is compelled so to construe the word ‘relations.’ ” Those words are precisely applicable to the present case. Plainly there is, according to the language of the testator himself, no reference to the Statutes of Distribution or the law which has been substituted for those Acts. The statute was introduced because I, in order to save the will, had to place a restriction upon the meaning of the word “successors,” and I stress that word “successors,” because the phrase is not “heirs” simpliciter, in which case I should have had to consider how far the Court of Appeal had overruled certain earlier authorities; but the words are “heirs and successors,” a composite phrase, and one in which I think both words are to receive a proper interpretation. Therefore, I have, in order to make the phrase not void for uncertainty, to put a restriction upon the meaning of the word “successors,” and therefore I should say, but for certain considerations which I am about to consider, without hesitation that this case is in effect covered by the decision of the Court of Appeal in *In re Gansloser's Will Trusts*.⁷

Before I leave that decision, I would refer to the way in which Jenkins L.J. there stated the problem, though it does not differ in any material way from the way in which the Master of the Rolls stated it. First of all Jenkins L.J. referred to *Eagles v. Le Breton*⁸ and cited the passage which I have already read. He then said⁹: “That decision commends itself to me as being “in accordance with common sense and in accordance with the “basic principles of the construction of wills. The rule, “whether it be called a rule of construction or a rule of convenience, under which the word ‘relations’ is held to be “limited to the next of kin of the propositus according to the “statutes is an artificial rule which the court in its benevolence “has adopted to prevent a testator’s disposition failing from “uncertainty. That was considered sufficient justification for “imputing a wholly conventional and artificial intention to the “testator by limiting his meaning of the word ‘relations,’ or “the meaning he might attach to the words ‘relations,’ to the “next of kin according to the statutes. The alternative of “uncertainty was the justification for the procedure. But, that

⁷ [1952] Ch. 30.⁸ 42 L.J.Ch. 362.⁹ [1952] Ch. 46.

“procedure having been gone through and the problem of uncertainty thus resolved, I cannot, speaking for myself, see what justification there can be for going on to impute to the testator a further entirely artificial intention that the fund or subject-matter of the gift should be divided amongst the next of kin according to the statutes in the shares and manner provided for by the statutes. That is a matter with which uncertainty has nothing to do; and, speaking for myself, in a case of this sort, where there is a gift to ‘relations,’ and the reference to the Statutes of Distribution is imported simply and solely by force of the benevolent rule of the court, I think there is no sufficient justification for applying it beyond the point necessary to avoid uncertainty.”

Faced with that authority, Mr. Micklem has submitted that there is a lot more in this problem than would appear on the face of the judgment of the Court of Appeal in *In re Gansloser's Will Trusts*,¹⁰ and so far I think that he is undoubtedly right. He has submitted further that the true distinction is between cases in which the words that have to be curtailed refer to the relationship of the class to the testator, and cases in which the words which have to be restricted refer to the succession of the class to the testator. There certainly is a good deal of authority to support that distinction. The Master of the Rolls in the *Gansloser* case¹¹ made some reference to a part of that distinction, because he said¹²: “. . . in the class of case in which the persons to take are next of kin, as distinct from next of kin according to the statutes, it is conceded that the general rule would apply, namely, that the class take as joint tenants.” But no member of the court made any reference to the further elaboration of that argument, namely, that where the words do not relate to the consanguinity of the class but to their qualifications as successors to the propositus, some different rule applies. Any such different rule would, I think, plainly be inconsistent with the general statement of principle enunciated by Lord Romilly M.R. in *Eagles v. Le Breton*¹³ and Evershed M.R. and Jenkins L.J. in *In re Gansloser's Will Trusts*,¹⁴ though it is true to say that the precise point was not relevant for the determination of the appeal in question in the latter case, because I do not think that anyone would doubt that the word “relations” referred rather to consanguinity than to succession.

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¹⁰ [1952] Ch. 30.¹¹ Ibid.¹² Ibid. 41.¹³ 42 L.J.Ch. 362.¹⁴ [1952] Ch. 30.

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Next I must look to see how far this suggested modification of the principles enunciated in the Court of Appeal in *In re Gansloser's Will Trusts*¹⁵ is supported by authority, and the result of my investigation is certainly singular. Jarman (8th ed., vol. 3, p. 1609) says: "Where 'representatives'—of course, I have not got the phrase "representatives" here, but it is germane because "representatives" does to my mind, primarily at any rate, import some kind of succession—"means "the statutory next-of-kin, the manner and proportions in which "they take are regulated by the statute, unless they are expressly "directed to take equally. Where 'representatives' means the "true next-of-kin, they take as joint tenants." That was a very good starting point for Mr. Micklem, because if that were really consistent with authority and with the most recent decision of the Court of Appeal in the *Gansloser* case,¹⁵ it would indicate that in a case like the present, where the reference is plainly to persons who take by succession, they would take in the proportions indicated in the statute, though it does not say so in terms. But where does that statement of principle come from? First of all, there is *Booth v. Vicars*,¹⁶ a decision of Knight Bruce V.-C. The words there in question were "next legal "representatives." He thought (and I must say I should have taken the same view) that that was a reference to persons who succeeded the propositus. He seems to have thought that in that case the persons in question, the class, took according to the Statutes of Distribution.

The matter had been much more fully discussed long before, namely, in 1789, in *Rowland v. Gorsuch*.¹⁷ (The case is erroneously stated in the original edition as being *Humphreys v. Humphreys*¹⁸ on the second and third pages of the report, but that is a mistake, the real name of the case is *Rowland v. Gorsuch*.¹⁹) What the Master of the Rolls there said is extremely interesting, because it is the earliest record known to me of the kind of argument which has ultimately prevailed in the Court of Appeal, though, curiously enough, the then Master of the Rolls seems to have arrived at a somewhat different conclusion. He said this²⁰: "We all know that in the meaning of the "Statute of Distributions, descendants ad infinitum are repre- "sentatives of the persons who, if alive, would be next of kin of "the intestate. Where bequests have been made to 'kindred'

¹⁵ [1952] Ch. 30.¹⁸ *Ibid.* 188.¹⁶ (1844) 1 Coll. 6.¹⁹ *Ibid.* 187.¹⁷ (1789) 2 Cox Eq.Cas. 187.²⁰ *Ibid.* 188.

“or ‘relations’”—I stress the word “relations”—“these have been considered as being so wide, as to make it impracticable to adopt it literally, and therefore it was necessary to find some rule to go by; and that rule has been to confine such a bequest to persons who would take as next of kin. I agree with the case of *Thomas v. Hole*,²¹ that no greater restriction than is absolutely necessary should be put upon the testator’s disposition, and therefore that although the next of kin only can take in the cases alluded to, yet they may still take per capita where the testator has directed an equal distribution.” I must pause to point out that he is there considering the word “relations” and that that proposition is wholly irreconcilable with the decision of the Court of Appeal in *In re Gansloser’s Will Trusts*,²² because the rule is not in such a case, as they have clearly laid down, that prima facie the distribution is in the proportions fixed by the statute. I stress that, because though this particular case did not deal with the word “relations,” as the judgment is based upon a general proposition which has now been held to be inaccurate, its weight must be very small. The Master of the Rolls in *Rowland v. Gorsuch*²³ considered then the words which he had there to deal with, and he said²⁴: “But in this case the testator after giving some legacies, gives all the residue to the ‘descendants or representatives of each of my first ‘cousins, deceased, in equal shares and proportions with my ‘cousins now alive.’ If the word ‘descendants’ had been made use of without the word ‘representatives,’ there would have been no difficulty, for the propagation of mankind does not run on so fast as to make the execution of such a bequest impracticable,”—I think that that might be open to question in these days, too, but that is irrelevant for the present purpose—“and there is no case which would prevent all the descendants from taking a share. But the difficulty arises on the words added to ‘descendants,’ namely, ‘or representatives’”; and I stress that, because it is upon the words “or representatives” that he is dwelling. “Now,²⁵ if they take as representatives, they must take per stirpes: if any person is under the necessity of making his claim as representative, he must take the share in the same manner as the person he represents.” Then he goes on later²⁵: “I have had a little doubt whether they are to take

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²¹ (1734) Cas.temp.Talb. 251.²⁴ Ibid. 188.²² [1952] Ch. 30.²⁵ Ibid. 189.²³ 2 Cox 187.

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“per capita or per stirpes; but upon the whole I think no person taking as representative can take otherwise than as statute gives it to representatives, i.e., per stirpes.”

That case looks very well for Mr. Micklem, because he says truly that taking as representative is very like taking as successor, and it is; but, unfortunately, not only is that based upon a wrong statement of principle but also that actual decision appears to be quite inconsistent with the decision in the case which I am about to cite; and, as the first case which I mentioned seems, as far as I can see, to be based (so far as it is based on anything in particular) upon *Rowland v. Gorsuch*,²⁶ it presumably will stand or fall with *Rowland v. Gorsuch*.²⁶

The next case is *Stockdale v. Nicholson*,²⁷ where the words were “to the next personal representatives.” There Malins V.-C. held as follows²⁸: “My view of the case is, that the ‘next ‘personal representative’ means ‘nearest of kin’; they take as a class, and, for want of words of division, they take as joint tenants.” Then he said this: “There is one point to which I wish to direct counsel’s attention. In that case of *Booth v. Vicars*,²⁹ Knight Bruce L.J. held that it was the next of kin, according to the statute, who took; but I think the authorities since that decision are so clear that a gift to the next of kin, as a class, gives a joint tenancy to the nearest of kin, that that is my interpretation of this will. But as that part of the case was very slightly argued—only adverted to by Mr. Glasse—if any party desires to speak to that matter again, upon that point alone, I shall be very happy that he should do so. Mr. Baily considered that the question had been so clearly settled by *Withy v. Mangles*,³⁰ and other cases, that it would be hopeless to argue it. Mr. Glasse concurred in this view.”

I believe that if Mr. Micklem had been arguing that case he would have argued that point and might well have succeeded, because what he would have said is this, that no doubt the class is construed as meaning next-of-kin by consanguinity; and, so far as that goes, there is nothing to exclude the principle of joint tenancy, yet the word “representative” contains another element, namely, the element of succession, which is lacking in the word “relations”; that it was upon that element that

²⁶ 2 Cox 187.²⁷ (1867) L.R. 4 Eq. 359.²⁸ *Ibid.* 371.²⁹ 1 Coll. 6.³⁰ (1843) 10 Cl. & F. 215.

*Rowland v. Gorsuch*³¹ was decided and presumably upon which the case of *Booth v. Vicars*³² was decided, and that there was no reason why *Stockdale v. Nicholson*³³ should not have been decided in the same way. However, the fact remains that counsel were not prepared to argue it and there is an authority which is quite inconsistent with the authority of those two earlier cases.

Next, there are cases where the word is "heirs." There again, there is no express reference in those cases to the Statutes of Distribution, and therefore one would have expected, applying the doctrine stated by the Court of Appeal in *In re Gansloser's Will Trusts*,³⁴ that the distributions would be on the basis of joint tenancies, but in at least two cases they were not. Though I have different words here, I still feel that they do afford some basis for the argument that Mr. Micklem put before me, because the word "heirs" does, I think, connote an idea of succession as well as an idea of consanguinity.

The judgments in those two cases, unfortunately, are lacking in reasoning for their decision. The first is *In re Porter's Trust*,³⁵ where Page Wood V.-C. gives in fact no reason for his conclusion at all, but it is quite plain that he did decide that in a case where the words were "or his heirs" the heirs took in proportions. He decided what was meant by the word "heirs" and then decided that that class took in the proportions fixed by the Statutes of Distribution. As I say, in that case there was no reference to the statute, and that decision seems to be inconsistent with the principle enunciated by the Court of Appeal. I do not know whether it would now stand or not; but, for my part, even if that particular case can stand, it does not seem to me that it is a sufficiently good foundation for the ingenious but badly documented doctrine which Mr. Micklem has evolved in his argument. When I say "badly documented," I am quite sure that he has given me everything that there is in the books. What I mean is that the documents are not really very satisfactory as documents.

Then there is *Jacobs v. Jacobs*.³⁶ There again, the words were "or his heirs," and it was held that the class took in the proportions fixed by the statute, no reasons for that decision being given. But—and it is a most curious circumstance, because I have already said that no reasons were given for this

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³¹ 2 Cox 187.³² 1 Coll. 6.³³ L.R. 4 Eq. 359.³⁴ [1952] Ch. 30.³⁵ (1857) 4 K. & J. 188.³⁶ (1853) 16 Beav. 557.

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part of the judgment, and I think that is a quite accurate statement—the House of Lords in *Bullock v. Downes*³⁷ seem to have taken a different view (or I think that I would be more accurate in saying that some members of the House of Lords seem to have taken a different view) because Lord Brougham first of all stated the rule in the way in which the Court of Appeal have recently restated it. He said³⁸: “The rule is, that where a testator gives “a direction for a class of persons to take according to the “Statute of Distributions, that is to be regarded not merely as “a direction to point out or discover the persons who are to take, “but as affecting the interests so to be taken.” Then he goes on to say³⁹: “I rely upon *Jacobs v. Jacobs*⁴⁰ and ” a certain other case “as laying down clearly this principle.” But the truth appears to be that no principle of any sort is laid down by *Jacobs v. Jacobs*⁴⁰ and, on analysis, there does not appear to have been any direction in that case for a class of persons to take according to the Statutes of Distribution. Therefore, I cannot feel that the authority of *Jacobs v. Jacobs*⁴⁰ can be established by a reference to Lord Brougham’s observation about it.

There is another reference to the same case by Lord Cranworth in his speech. He stated the principle in this way⁴¹: “The “authorities seem to establish, that where there is a bequest to “the persons who would have been entitled under the Statute “of Distributions, those persons are to take as they would have “taken if there had been an intestacy.” That is not, of course, so specific as the statement by Lord Brougham. Then he said later⁴²: “The same principle was acted on in the subsequent “cases of *Jacobs v. Jacobs*⁴³ ” and others.

As I say, it is not for me to decide whether, if I were faced with the words “or heirs ” simpliciter, I should feel that those cases, *In re Porter’s Trust*⁴⁴ and *Jacobs v. Jacobs*,⁴⁵ had been by implication overruled by the decision of the Court of Appeal in *In re Gansloser’s Will Trusts*.⁴⁶ I hold that, whether or not any limitation ought to be put upon the general propositions enunciated by the Court of Appeal, there is enough in those judgments to justify me in holding that this hitherto unconstrued collocation of words, “heirs and successors,” is not such a

³⁷ (1860) 9 H.L.C. 1.

³⁸ Ibid. 16.

³⁹ Ibid. 17.

⁴⁰ 16 Beav. 557.

⁴¹ 9 H.L.C. 21.

⁴² Ibid. 22.

⁴³ 16 Beav. 557.

⁴⁴ 4 K. & J. 188.

⁴⁵ 16 Beav. 557.

⁴⁶ [1952] Ch. 30

reference to the Statutes of Distribution as would oust the general rule that the members of the class take as joint tenants; and I so decide.

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Declaration accordingly.

Solicitors: *Drake, Sturton & Co. for G. H. Morgan & Sons, Ludlow; Kingsford, Dorman & Co. for Eddowes, Perry & Osbourne, Sutton Coldfield.*

I. G. R. M.

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Apr. 2, 3, 17.

[1956 W. 1830.]

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Legal Aid—Costs—Charge on property recovered—Dwelling-house—Specific performance—Contract to exchange dwelling-houses—Action for specific performance—Parties assisted persons—Decree of specific performance—Plaintiff assessed to maximum contribution to costs—Defendant assessed to nil—Charge by Law Society on dwelling-house received by plaintiff in exchange as “property recovered or preserved”—Whether charge enforceable—Letters between plaintiff and Law Society—Whether relevant—Legal Aid and Advice Act, 1949 (12, 13 & 14 Geo. 6, c. 51), s. 3 (4)—Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), regs. 16 (8), 17 (2); Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954, No. 166); Legal Aid (General) (Amendment No. 2) Regulations, 1955 (S.I. 1955, No. 1829).

W. claimed specific performance by H. of a contract to exchange dwelling-houses and, on applying under the Legal Aid and Advice Act, 1949,¹ was granted legal aid. He was so informed by letter

¹ Legal Aid and Advice Act, 1949, s. 3 (4): “Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person’s contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings.”

Sch. III, para. 1 (1): “The sums allowed to counsel in connexion

“with proceedings in the House of Lords or the Supreme Court shall be 85 per cent. of the amount allowed on taxation of the costs . . .”

Para. 2 (1): “The sums allowed to a solicitor in connexion with proceedings in the House of Lords or the Supreme Court shall be the full amount allowed on taxation of the costs on account of disbursements and 85 per cent. of the amount so allowed on account of profit costs. . . .”

Legal Aid and Advice (General) Regulations, 1950, reg. 17 (2) (replacing reg. 17 (1) by virtue of the

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(in a form B.1. which was then in use under the Legal Aid (General) Regulations, 1950, as amended). In the letter of acceptance (form B.2.), which was signed by W., there was a provision that he would not have to pay more than £194, which the National Assistance Board had fixed as his maximum contribution, in respect of his costs. H. also was legally aided, her contribution being assessed at nil. She counterclaimed for rescission of the contract. The action succeeded, the only order made as to costs being for taxation of both parties' costs under the Legal Aid and Advice Act, 1949. The taxed costs payable by W., after being reduced as the Act directed, amounted to £480, and he paid, as called on to do, his maximum contribution of £194. In respect of the remaining £286, the Law Society, relying on section 3 (4) of the Act of 1949, registered, under section 10 (1) (b) of the Land Charges Act, 1925, a charge against W.'s dwelling-house which H. had conveyed to him pursuant to the decree of specific performance. W. now claimed against the Law Society a declaration that the Society was not entitled to the charge and an order that the registration be vacated:—

Held, in deciding that the charge ought not to be enforced and ordering that the registration be vacated:

(1) That the Society was not entitled to a charge on W.'s dwelling-house under section 3 (4) of the Act of 1949, as the house was not "property . . . recovered or preserved for him in the "proceedings" within that subsection: *The Philippine* (1867) L.R. 1 A. & E. 309; *Westacott v. Bevan* [1891] 1 Q.B. 774; 7 T.L.R. 290; and *Loescher v. Dean* [1950] Ch. 491; 66 T.L.R. (Pt. 1) 1208; [1950] 2 All E.R. 124 applied.

(2) That the form of words used in forms B.1. and B.2. did not amount to an exception within the words, in section 3 (4) "except so far as regulations otherwise provide . . ." and that the Society would not have been precluded from making a further charge on that ground.

(3) That even if W.'s dwelling-house were "property . . . "recovered or preserved for him in the proceedings" within section 3 (4) of the Act of 1949, the registration of the charge ought to be vacated, as it was contrary to the whole policy of the Act that a legally aided person's dwelling-house should be made subject to a charge where it happened to be the property recovered or preserved in the action.

ADJOURNED SUMMONS.

The plaintiff, Alfred Wagg, had in earlier proceedings claimed against Mrs. Edith Maud Hammond, specific performance of a contract for the exchange of her dwelling-house, 19, Front Row, Highgate, King's Lynn, Norfolk, for his dwelling-house, 1 and 2, Sherwood Cottages, Pot Row, Grimston, Norfolk, and on

Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954, No. 166): "In determining the "amount of the assisted person's "liability . . . his dwelling-house . . . "shall be left out of account. . . ."

November 17, 1952, Upjohn J. pronounced a decree of specific performance. The plaintiff and Mrs. Hammond were both in receipt of legal aid. Mrs. Hammond's contribution to her costs was assessed at nil, the plaintiff's contribution to his at the maximum of £194, which he paid. The Law Society had spent £480 16s. 11d. towards his costs, and on April 2, 1955, registered in its own favour, as a land charge in Class B, a charge on 19, Front Row for the balance of £286 16s. 11d. It now claimed, by virtue of section 3 (4) of the Act of 1949, to be entitled to that charge.

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By this summons the plaintiff claimed a declaration that, on the true construction of the Legal Aid and Advice Act, 1949, and of the Legal Aid (General) Regulations, 1950, as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, and the Legal Aid (General) (Amendment No. 2) Regulations, 1955, and in the events which had happened, the Law Society was not and never had been entitled to the charge, and an order that the Society forthwith vacate it.

J. A. Plowman Q.C. and *R. M. Havers* for the plaintiff. There are two questions: (1) Is 19, Front Row "property . . . recovered " or preserved for [the plaintiff] in the proceedings "; and (2) if so, is the Law Society, on the true construction of the Act and the regulations, entitled to a charge on it? It is not "property . . . recovered or preserved " but is property exchanged. [Reference was made to *Westacott v. Bevan*,² *The Philippine*³ and *Loescher v. Dean*.⁴] It has been held that property the subject-matter of a suit relating only to an easement is not "property . . . recovered or preserved ": *Foxon v. Gascoigne*.⁵

On the second point also the Law Society is not entitled to a charge, since "regulations otherwise provide " within the meaning of section 3 (4). At the time of the action for specific performance the then regulations brought about a contract that the Law Society would conduct that action for the plaintiff at a cost of £194. Form B.1. provides that if an acceptance form be signed, a certificate shall be issued. Certainly it provides for the plaintiff's additional liability for costs, but it is only recently that the words "unless I have recovered damages or property " were added to Form B.2., which shows that the Law Society

² [1891] 1 Q.B. 774; 7 T.L.R. 290.

³ (1867) L.R. 1 A. & E. 309.

⁴ [1950] Ch. 491; 66 T.L.R. (Pt.

1) 1208; [1950] 2 All E.R. 124.

⁵ (1874) 9 Ch.App. 654.

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recognized that it could not before then make a further charge if a certificate had been issued under Form B.2.

The case is not one in which the Law Society is entitled to a charge and the court should not enforce it and should order that the registration be vacated.

E. Milner Holland Q.C. and *Nigel Warren* for the Law Society. The registration should not be vacated and the charge should be enforced. Section 3 (4) applies not only where there is a difference between the amount of the contribution and the amount of the costs incurred but also where there has been no contribution at all. [*Reg. v. Fraser Harrison (Judge)*⁶ and *Law Society v. Rushman*⁷ were referred to.] Where the court pronounced against several wills which had been propounded by a party who was interested also on intestacy, the solicitors of the party concerned were held entitled to a charge on the interest under the intestacy as "property . . . recovered or preserved": *Hyde v. White*⁸; applied in *Wimbourne v. Fine*.⁹ Also, both parties are bound to obey the law as set forth in section 3 (4): *Maritime Electric Co. Ltd. v. General Dairies Ltd.*¹⁰; and the present form of words in Forms B.1. and B.2. does not make a further exception within that subsection. In a friendly suit for the appointment of a guardian and for various directions, which suit had been adopted by an infant on attaining majority, an order was made on a petition to establish a charge for a deceased solicitor's costs: *Baile v. Baile*.¹¹

April 17. *HARMAN J.* read the following judgment. In July, 1950, the plaintiff, who was the owner and occupier of Nos. 1 and 2, Sherwood Cottages, Pot Row, Grimston, in the County of Norfolk, entered into an oral agreement with a Mrs. Hammond, then the owner and occupier of a house known as 19, Front Row, Highgate, King's Lynn, in the same county, for the exchange of houses between them, no monetary consideration passing in either direction. In pursuance of this agreement the parties did in fact exchange possession of their respective dwelling-houses, but they fell out over details, particularly, it appears, as to conditions to be performed by the plaintiff, and though he remained

⁶ [1955] 1 Q.B. 287; [1955] 1 All E.R. 270.

⁷ [1955] 1 W.L.R. 681; [1955] 2 All E.R. 544.

⁸ [1933] P. 105; 49 T.L.R. 325.

⁹ [1952] Ch. 869; [1952] 2 T.L.R. 596; [1952] 2 All E.R. 681.

¹⁰ [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748.

¹¹ (1872) L.R. 13 Eq. 497.

anxious to complete the contract Mrs. Hammond was anxious to rescind it.

In these circumstances the plaintiff applied for legal aid under the Legal Aid and Advice Act, 1949, to the local committee at King's Lynn, and on February 22, 1951, received from the Law Society, through the local secretary, a letter in the form known as B.1. as approved by the Law Society, that form being among the forms published with the Legal Aid (General) Regulations, 1950. This letter informed the plaintiff that his application had been approved and that the local committee was prepared to issue a certificate "on the terms and subject to the "conditions set out in the acceptance form of which I enclose "two copies. Please study these terms and conditions care- "fully." The plaintiff was informed that in order to obtain a certificate he must sign one of the acceptance forms and return it with his cheque to the Law Society. The letter ended in these terms: "I have to draw your attention to the fact that "your liability by virtue of any order for costs made against "you with respect to the proceedings to which your certificate "relates will not exceed the amount (if any) which is determined "by the court or judge as a reasonable one for you to pay having "regard to all the circumstances, including the means of all the "parties to the proceedings and their conduct in connexion with "the dispute. If any such sum becomes payable by you it will "be additional to any contribution payable by you to the Law "Society."

The acceptance form, B.2., was also a printed document whereby the plaintiff, by signing it, expressed his desire to accept a certificate and to comply with the terms and conditions. He enclosed a cheque for £50 as required by paragraph 4. The action was to relate to an action in the Chancery Division for specific performance and the plaintiff's contribution was to be £50 down and six monthly payments of £16 13s. 4d. Condition 5 was in these terms: "If my costs of the proceedings to which "my certificate relates prove to be more than the local com- "mittee at present expect, I may be called upon to pay such "further sums as the Law Society may require but so that in all "(including the sum mentioned in condition 4 above) I shall not "have to pay more than £194 which the National Assistance "Board have fixed as my maximum contribution."

A civil aid certificate was issued to the plaintiff on March 27, 1951, in accordance with the acceptance form, the contribu- tion being stated at £150 as assessed by the local committee

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and the maximum contribution at £194 as determined by the National Assistance Board. On the next day, Mrs. Hammond issued a writ against the plaintiff in the Queen's Bench Division for rescission of the contract. The plaintiff's writ for specific performance was issued in this division on April 11, 1951, and on April 17, 1951, he obtained an emergency certificate to defend Mrs. Hammond's action in the Queen's Bench. On June 4, 1951, the Queen's Bench action was transferred to the Chancery Division and the two actions were consolidated, Mrs. Hammond's claim for rescission being made by way of counterclaim in the plaintiff's action for specific performance. The action and counterclaim came on for trial on November 17, 1952. The plaintiff succeeded and Mrs. Hammond's counterclaim was dismissed. No order for costs was made on either side except for taxation of both parties' costs under the Legal Aid and Advice Act, 1949. I understand that Mrs. Hammond's contribution was assessed at nil. No order was made for payment of the plaintiff's costs by way of a charge on the house which Mrs. Hammond received in exchange. This, which would obviously have been the ordinary order, was, I take it, precluded because under regulation 17 (1) (b) of the Regulations of 1950 made under the Act the dwelling-house of an assisted person was to be left out of account in assessing the costs to be paid by her. The plaintiff's costs were taxed and certified on February 10, 1955, in the following sums: (1) profit costs, £261 18s. 3d.; (2) counsel's fees, £149 14s. 6d.; (3) other disbursements, £130 18s. 7d. Taking 85 per cent. of the first two items, as the Act directs, the costs payable on the plaintiff's behalf therefore come to £480 16s. 11d., and he has paid, as he was called on to do, his maximum contribution of £194. In respect of the excess of £286 16s. 11d. the defendant, the Law Society, has registered under the Land Charges Act, s. 10 (1) (b), against the plaintiff's dwelling-house, 19 Front Row, Highgate, a charge, and it is the validity of that charge which is now in question.

If the defendant is right the result of the plaintiff's proceedings is most extraordinary and disastrous to him. He has got the house which he contracted to acquire, but has paid for it not only the price which he agreed, namely, the house given in exchange to Mrs. Hammond, but in addition his maximum contribution of £194, and on top of that a charge of £286 16s. 11d. on his house. This is the result of being right. Mrs. Hammond, who was in the wrong throughout, has got the house she contracted to acquire without either payment of costs or any charge

on it at all so far as I know. When a result so extraordinary is produced it is natural to look with some suspicion on the reasons which are said to have brought it about.

The defendant's case is simple enough. It relies on section 3 (4) of the Legal Aid and Advice Act, which is in these terms: "Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings." It says that the £286 odd is the excess of the fund's liability on the plaintiff's account over his contribution, that the plaintiff's present dwelling-house is "property . . . recovered or preserved for him" in the action, and that therefore the excess is made by the very words of the section a first charge on the property for the benefit of the fund. The defendant further argues that the plaintiff is in no worse a position than any plaintiff who sues an impecunious defendant and who cannot recover his costs even if he succeeds. This, however, is a false point in my judgment. If Mrs. Hammond were not legally aided the plaintiff could at least recover his costs up to the value of the house which he had to convey to her as consideration for his purchase. The Legal Aid (General) Regulations prevent this, as I have pointed out, because the house is Mrs. Hammond's dwelling-house and, therefore, exempt when considering her liability for costs.

The plaintiff at the Bar made two answers, first that this property was not "recovered or preserved" within the meaning of the section, but was merely exchanged for other property of presumably equal value. This seems to me a point of difficulty on which there is no direct authority. At first sight it appears that the property which it was the object of the plaintiff's action to obtain must, if the action succeeds, be property recovered in the action. The result of the action, however, shows that there was a valid contract already in existence before it began. If so, the plaintiff was already the equitable owner of the property; all that was recovered in the action was the legal estate. If he had sued, as he might have done, for damages for breach of contract, he could only have recovered such sum as represented the excess in value of the house he got (which, in breach of contract, had not been conveyed to him) over the value of the house which he had agreed to convey in exchange. If the two

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were of the same value he could only recover 40s. for the breach. There is no evidence here that one was more valuable than the other. Further, if the house which the plaintiff got was recovered in the action, so was the house which the defendant was obliged to accept recovered for her. I do not see how property can have been recovered or preserved for both. Property is "recovered," so the authorities seem to show, when the plaintiff has been enriched as the result of the action.

The order in this, as in other specific performance actions, was that on the plaintiff making a good title and tendering a proper conveyance of his house, Mrs. Hammond should do the like as to her house, but that if either failed to make a good title each should deliver up possession to the other.

Can it be said, on an order in this form, that the houses, or one or each of them, have been recovered or preserved for the persons to whom they are to be conveyed? It seems to me unlike any of the cases to which I was referred. Most of those cases deal with the like phrase found in the Solicitors Acts, now section 69 of the Act of 1932. The earliest case to which I was referred was *The Philippine*.¹ In that case the skipper of a boat sued for wages and so forth and there was a counterclaim by the owner against him for moneys due from the skipper for payments which he had agreed to make for shares in the ship. The result of the claim and counterclaim was that it was found that £103 7s. 8d. was due to the plaintiff on the balance of his account as master, and £173 was due from him on account of the counterclaim, leaving a balance due from him.

Then the headnote goes on: "On a motion by the plaintiff's attorney, under the [Solicitors Act, 1860, s. 28] that he might have a charge for his costs in the suit upon the plaintiff's interest in the ship as being property 'recovered or 'preserved': Held, that as the result of the suit to the plaintiff was, that he was entitled to a transfer of the shares in the vessel for a less sum than he would have been if the suit had not been instituted, the plaintiff's attorney had recovered or preserved the property to the plaintiff, and was entitled to a charge upon it for his costs to an amount not exceeding the sum so preserved." In other words, the advantage obtained by the plaintiff was the property on which the charge to the attorney could be given, not the whole property.

Next I refer to *Westacott v. Bevan*.² There: "The plaintiff claimed £742 for work done under a contract to repair the

¹ (1867) L.R. 1 A. & E. 309.

² [1891] 1 Q.B. 774; 7 T.L.R. 290.

“defendants’ ship. The defendants paid £500 into court, with a denial of liability, and counter-claimed damages for the plaintiff’s delay in completing the work according to the contract. The plaintiff proceeded with the action, and in the result £465 was found to be due to him on his claim, and £210 to the defendants on their counter-claim:—Held, that the sum paid into court was not property ‘recovered or preserved’ by the exertions of the plaintiff’s solicitor within the meaning of 23 & 24 Vict. c. 127, s. 28, so as to entitle him to charge the whole sum with payment of his costs.” He was entitled, however, to charge, as the Court of Appeal held, the balance between the claim and the counterclaim, that is to say, the excess of £465 over £210. That, again, rather points to the view that you must find a balance in favour of the plaintiff or the defendant, as it may be, in order that you may give the attorney a charge. In *Greer v. Young*³ I find Brett M.R. describing the right as a right akin to salvage.

A more modern decision is one of my own, *Loescher v. Dean*,⁴ where I held that money paid by a successful plaintiff in a purchaser’s specific performance action was not “recovered or preserved” by the defendant’s solicitors so as to entitle them to a charging order. That money stands on the same footing as the house conveyed by the plaintiff here, and if the decision be right it would follow that Mrs. Hammond’s solicitors here would obtain no charging order against that house. As I have pointed out, it is difficult to suppose that a different rule applies to the house conveyed to the plaintiff. On the whole, I conclude that this point of the plaintiff’s is a good one.

If so, that is enough to conclude the case, but I think I should deal with the plaintiff’s second point, which was that section 3 (4), on which the defendant relies, starts with the words “except so far as regulations otherwise provide,” and that the effect of the regulations, as they then stood, was that a contract arose between the plaintiff and the defendant whereby they agreed to conduct the action for him at a maximum expense to him of £194 so far as it was concerned.

The argument is that the forms are part of the regulations. First, the form B.1. states categorically that the certificate will issue if the acceptance form is signed. Moreover, B.1. specifically draws attention to a further possible liability on the plaintiff in case of an order for costs made against him in the defendant’s

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³ (1883) 24 Ch.D. 545.

⁴ [1950] Ch. 491; 66 T.L.R. (Pt. 1) 1208; [1950] 2 All E.R. 124.

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favour, and this is a matter referred to in section 2 (2) of the Act. Reading this section anyone might be excused for thinking that it does cover all the financial conditions of legal aid, including liability for costs ordered to be paid to the other party. Next comes the acceptance form B.2., which by paragraph 5 expressly provides that the plaintiff shall not have to pay more than £194. It is pointed out that this form B.2. has recently been altered by adding the words "unless I have recovered damages or property," and the plaintiff argues that this is a recognition on the part of the defendant that before the appearance of those words a certificate issued on the faith of form B.2. precluded the defendant from making a further charge. In my judgment, this contention can only prevail if the form of words used in form B.2. can be said to provide an exception within section 3 (4) of the Act. Certain payments are, by regulation 16 (8), expressly excluded from the effect of the charge, and these are, no doubt, exceptions to which the section refers. In my judgment, the form of words used in forms B.1. and B.2. does not amount to a further exception even though constituting such a contract as is alleged on the plaintiff's behalf.

The defendant, in carrying out its duties under the Legal Aid and Advice Act, 1949, is bound to carry out the provisions of the statute and cannot preclude itself from its statutory obligations. It is, moreover, the duty of both parties to obey the law, part of which is section 3 (4) of the statute. In this connexion see *Maritime Electric Co. v. General Dairies Ltd.*⁵ I do not, therefore, accept this argument of the plaintiff.

If I were wrong about the "recovered or preserved" point, I still should not decide in the defendant's favour. This is for a reason not canvassed before me at the Bar. It seems to me that the cardinal factor in the case is that the property over which the charge has been registered is the plaintiff's dwelling-house. It is provided by the Act first that in assessing the plaintiff's contribution the value of his dwelling-house is to be left out of account; secondly, that in assessing costs to be paid by a civilly aided person to his opponent his dwelling-house is similarly to be left out of account. It seems to me, therefore, to be contrary to the whole policy of the Act that a legally aided person's dwelling-house should be made subject to a charge where it happens to be the property recovered or preserved in the action. If the value of the dwelling-house is to be excluded in assessing

⁵ [1937] A.C. 610; 53 T.L.R. 391; [1937] 1 All E.R. 748.

the plaintiff's contribution, whether to his own costs or those of the defendant, it seems an absurdity that it may yet be encumbered to recoup to the fund costs which should in the ordinary course have been paid by the defendant in the action. I cannot think that while Mrs. Hammond, who was in the wrong, can escape scot-free under this principle, the plaintiff, who was in the right, is not also exempted.

In my judgment, therefore, the Law Society's charge under section 3 (4), if contrary to my view it has one, ought not to be enforced against the legally aided person's dwelling-house, and on that ground, too, I would order the charge here to be vacated.

Order accordingly.

Solicitors: *Metcalfe, Copeman & Pettefar; Hempsons.*

K. R. A. H.

In re A.E.G. UNIT TRUST (MANAGERS) LTD.'S DEED.
MIDLAND BANK EXECUTOR & TRUSTEE CO. LTD. *v.*
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WAGG
v.
LAW SOCIETY.
Harman J.

1957
May 22, 30.
Wynn-Parry J.

[1957 A. 564.]

Accumulation—Power of—Unit Trust—Deed—Construction—Amounts available for distribution at end of accounting periods—Undistributed balances to be accumulated—Whether statutory provisions restricting accumulation of income applicable—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 164.

Trust and Trustee—Unit Trust—Right of unit holders to direct trustees—Accumulation.

By clauses 20 and 21 of a deed of trust, dated February 22, 1957, and made between a unit trust company of the one part and a trustee company of the other part, it was provided that, as soon as the amount of net income became available for distribution to unit holders in respect of any accounting period, the balance, if any, after distribution of the amount available for distribution should be added to the capital and should thereupon cease to be available for distribution.

On the question whether the trustee of the deed was bound, notwithstanding section 164 of the Law of Property Act, 1925,¹ to accumulate such balance of income:—

¹ Law of Property Act, 1925, "dispose of any property in such s. 164: " (1) No person may by any "manner that the income thereof "instrument or otherwise settle or "shall, save as hereinafter men-

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Held that, although the transaction by which a person became a unit holder involved a disposition of property, it was not such a disposition as could reasonably be said to fall within the ambit of the section. Further, since if in any given year all the certificate-holders required that the balance of the amount available for distribution should not be added to capital as contemplated, effect would have to be given to that requirement, the provisions of section 164 of the Law of Property Act, 1925, restricting accumulations of income were not applicable in any event.

Bassil v. Lister (1851) 9 Hare 177 and *Wharton v. Masterman* [1895] A.C. 186; 11 T.L.R. 301 applied.

ADJOURNED SUMMONS.

By a trust deed dated February 22, 1957, and made between A.E.G. Unit Trust (Managers) Ltd. of the one part, and Midland Bank Executor and Trustee Co. Ltd. of the other part, a unit trust was established to be known as the "A.E.G. Unit Trust."

The material provisions of the trust deed were as follows:

By clause 4 (b) units were issued by certificates (representing the units in question being delivered) by the trustee (meaning thereby the company or other the trustee for the time being of the trust deed) to or to the order of the managers (meaning thereby A.E.G. or other the managers for the time being of the trust) against payments of cash or transfers of property to the trustee.

By clause 11 the proceeds of such issues were to be held as part of the deposited property (meaning thereby all the assets of the trust excluding any amount standing to the credit of the distribution account as defined in clause 21 of the trust deed), and by clause 12 the deposited property was to be invested from time to time at the direction of the managers.

Clause 16 gave the managers a discretion (subject to the trustee not objecting) to direct investment in any security in which dealings were permitted on any recognized stock exchange

"tioned, be wholly or partially accumulated for any longer period than one of the following, namely:—
" (a) the life of the grantor or settlor;
" or (b) a term of 21 years from the death of the grantor, settlor or testator; or (c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator; or
" (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for

" the time being, if of full age, be entitled to the income directed to be accumulated. In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed . . ."

in Great Britain or the British Commonwealth or the United States of America, and it also gave the managers power to vary investments.

Clause 20 (c) provided that the accounts of the trust were to be made up as at December 31 in each year in respect of the period since the last previous December 31, or (in the case of the first year of the trust) since the commencement of the trust, and the net income of the trust in such accounting period (subject to certain usual adjustments) became available for distribution to unit holders.

Clause 20 (d) provided that, as soon as the amount available for distribution in respect of any accounting period had been computed, the managers should determine "the amount (if any) to be distributed which should be such amount not exceeding the amount available for distribution as the managers shall in their absolute discretion determine."

Clause 21 was as follows: "On February 25, 1958, and the 25th day of February in every year following until the termination of the trust the trustee shall distribute among the holders rateably in accordance with the number of units represented by the certificates held by them on the immediately preceding accounting date the amount (if any) to be distributed to the holders (as determined in accordance with sub-clause (d) of clause 20 hereof) in respect of the previous accounting period ending on such accounting date. As at each such accounting date the amount of cash required to effect such distribution shall be transferred to a special account to be entitled 'Distribution Account' and the amount at credit of the distribution account shall not for any of the purposes of this deed be treated as part of the deposited property but shall be held by the trustee upon trust to distribute the same as herein provided. The balance (if any) of the amount available for distribution shall be added to capital and shall thereupon cease to be available for distribution."

Since the execution of the trust deed the company had at the direction of A.E.G. issued certain units in the trust.

By a letter dated March 20, 1957, A.E.G. notified the company as follows: "Dear Sirs: As managers of the above-mentioned trust, we think it right to inform you without delay that it is our present intention not to direct the distribution (in accordance with clause 20 (d) of the trust deed) of any part of the amount which will be available for distribution at the end of the current accounting period, i.e., on December 31

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“next. In the result, the whole of that amount will fall to be
“accumulated under the final provision of clause 21. Our present
“policy is to accumulate all the income of the trust and we do
“not at present intend to direct any distribution at the end of
“any future accounting period. We are giving you this informa-
“tion now, because we understand that you have been advised
“that there is some doubt as to the validity of clause 21, and
“that an application to the court may be necessary. If this is so,
“may we suggest that you commence proceedings without delay
“to have the matter decided, because, until we know whether or
“not clause 21 is valid as it stands, it is impossible for us to
“frame our investment policy? . . . You will also, of course,
“appreciate that while this doubt is unresolved we do not feel
“that we can properly invite the public to subscribe for units,
“so that, taken all round, the matter is one of considerable
“commercial urgency.”

A summons was, therefore, taken out by the company (the present trustee of the deed) to determine whether, notwithstanding the provisions of section 164 of the Law of Property Act, 1925,¹ the trustee was bound (under the provisions of clause 21 of the deed) to accumulate the amount available for distribution at the end of each accounting period, if and so far as it should exceed the amount determined by the managers to be distributed in respect of such accounting period.

E. J. A. Freeman for the plaintiff trustee.

K. J. T. Elphinstone for A.E.G. Unit Trust (Managers) Ltd. This trust to accumulate is one which can be carried into effect. It is a commercial transaction and is a commercial device to secure the accumulation of the balance after each annual distribution. Section 164 of the Law of Property Act, 1925, has no reference to that sort of transaction, and it is, therefore, unnecessary to consider its various subsections. If X takes Y's money for the purpose of investing it, that is not a case for section 164 at all. If X puts money into the pool, he is entitled, at any time, to take it out. [Reference was made to *Bassil v. Lister*,² *Wharton v. Masterman*³ and *Berry v. Geen*.⁴]

A distinction can be drawn in the case of a fund of which the income is directed to be accumulated; if there is only one person, who is interested in that fund, he can say: “I do not want the

¹ For note 1 see p. 415.

² (1851) 9 Hare 177.

³ [1895] A.C. 186; 11 T.L.R. 301.

⁴ [1938] A.C. 575; 54 T.L.R. 703;

[1938] 2 All E.R. 362.

“fund to be accumulated and I want my money back.” *Berry v. Geen*⁴ is a case where someone else is interested.

This is an absolute vested interest in an appropriated sum. Everybody would be able to be quit of the matter at any time.

J. L. Arnold for a unit holder. This provision for accumulation is void. It is an out-and-out disposition of the property and comes within section 164 and is a case in which the ordinary rules must be applied. The section applies, because the mischief which the action was designed to avoid (namely, a growing of the fund in which the unit holders would be interested) is present. [Reference was made to *Saunders v. Vautier*⁵ and *Wharton v. Masterman*.⁶]

Elphinstone in reply. This is a case involving a contractual right. It is a clear *Wharton v. Masterman*⁶ case. An interesting case, by analogy, is that of members of an unincorporated club, e.g., a lawn-tennis club. The club continues with a fluctuating class of persons. The members can close it down at any moment; they are the beneficiaries of the property.

Cur. adv. vult.

May 20. WYNN-PARRY J. This summons raises an interesting question of law in regard to the trust deed mentioned in the title to the originating summons, to which deed I will refer as the “trust deed,” the object of which is to constitute a unit trust, an expression now well known and understood.

Put shortly, it may be said that the question arises in this way. By clause 20 (d) of the trust deed it is provided that: [His Lordship read clause 20 (d) and continued:] By clause 21 it is provided that if it is determined to distribute less than the amount available for distribution, then, “The balance (if any) of “the amount available for distribution shall be added to capital “and shall thereupon cease to be available for distribution.” In view of that last provision, the question then arises whether or not section 164 of the Law of Property Act, 1925, applies. If it does not, *cadit quaestio*.

I will deal first with the question whether or not section 164 of the Law of Property Act, 1925, applies. This involves the construction both of the section and of the deed, and also a consideration of the mischief which the section is designed to meet. The section opens with the words: “No person may by

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⁴ [1938] A.C. 575.

⁶ [1895] A.C. 186.

⁵ (1841) 4 Beav. 115; Cr. & Ph.

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“any instrument or otherwise settle or dispose of any property. . . .” In my view the word “settle” has no application in this case. Then it is said that in the transaction by which a person becomes a certificate holder a disposition of property is involved. No doubt in one sense a disposition of property is involved, because money or money’s worth is paid over, but it is not every disposition to which the section applies. The section only applies to such dispositions as, reading the section as a whole, can reasonably be said to fall within its ambit. The ambit is qualified by the words which follow the opening words which I have read, namely, “in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely,” and then follows the statement of the four periods.

Let me test the matter by reference to the first period: “(a) the life of the grantor or settlor.” Now are either of those words apt to describe a person who desires to become a holder of units in the trust? In my view the answer must be “No.” What such person does is to make an investment by acquiring an interest in the trust in the form of one or more units, that investment being paid for in cash or money’s worth. The word “grantor,” well understood as it is by the court and by conveyancers, is quite inapt to describe a person who is making an investment. Paragraphs (b) and (c) of subsection (1) of the section are for the same reasons equally inapplicable to the transaction of investment, and on its wording paragraph (d) can have no application.

Again, let me test the matter by considering whether the trust deed falls within the mischief which the section is designed to prevent. The section is the present successor to the Thellusson Act (39 & 40 Geo. 3, c. 98). The origin of that statute was discussed by Turner V.-C. in *Bassil v. Lister*.¹ He said²: “With reference to the origin of the statute, we are fortunately in no difficulty. The law, as it stood before the statute, having put no restriction upon the accumulation of property, so long as the vesting could be suspended, Mr. Thellusson had by his will directed his personal property to be invested in land, and the rents and profits of the land to be purchased and of his real estate to be accumulated during the lives of all his descendants who should be living at the time of his death; and then limited the accumulated property in favour of certain of his

¹ 9 Hare 177, 183.

² Ibid. 181.

“descendants who might be then living; and, this disposition being upheld by the courts, it was deemed necessary by the legislature to interpose for the purpose of restricting such dispositions for the future: we have here, therefore, the key to the statute. It had its origin in dispositions for the accumulation of rents and profits qua rents and profits, and not in dispositions having any reference whatever to any bargains or contracts entered into for other purposes than the mere purpose of accumulation.”

Later he said³: “The enactment is that no person shall settle or dispose of real or personal estate so and in such manner as that the rents, profits, income, or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common-sense interpretation, as referring to the accumulation of rents, profits and income qua rents, profits and income. Why is the court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said that the court ought to do so, because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appears to me to beg the question; for it assumes that what the petitioner here calls an accumulation, suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute.”

Finally, I would refer to the last part of his judgment. He said⁴: “The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported, what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually, and the remaining profits are to accumulate and be divided at the end of the terms? What is to be done with policies of insurance on the lives of debtors? And how is the case put by Mr. Hobhouse, of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with? The absence of any provision in the Act for these and many other such cases which might be put leads strongly to the conclusion that such cases were not intended to fall within the Act; and, having regard both to the origin of the enactment and the spirit of the Act, I am of opinion that the

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³ 9 Hare 177, 183.⁴ Ibid. 184.

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“ case of the petitioner wholly fails, and that this petition of
“ rehearing must be dismissed with costs.”

It was argued by Mr. Arnold that the true test to apply was to see whether the right conferred was a right to a fixed or ascertainable money payment or whether it was a right to a true participation in the fund. In the first case he said section 164 of the Law of Property Act, 1925, would not apply; in the second case it would apply, because in the second case the mischief which the section was designed to avoid, namely, a growing of the fund in which unit holders would be interested, was present. For myself, however, I cannot accept that test. With all respect, it involves an over-simplification of the matter, and the argument which it is necessary to put forward to support it appears to me to be virtually that which Turner V.-C. rejected in *Bassil v. Lister*.⁵ My first conclusion, therefore, is that section 164 of the Law of Property Act, 1925, does not apply at all to this case.

This would be sufficient to dispose of the matter, but I do not desire to rest my judgment solely on the ground which I have just stated. There is a further ground on which I desire to rely. This further ground can be put in this way. The basic trust is to be found in clause 12 of the trust deed, which provides: “ The trustee shall stand possessed of the deposited
“ property upon trust for the certificate holders according and
“ subject to the provisions of this deed, and any moneys forming
“ part of the deposited property shall from time to time be
“ invested at the direction of the managers in accordance with
“ the provisions herein contained.” It is true that there are express provisions setting out circumstances in which the trust will come or be brought to an end, and there are express provisions for modification of the trust deed by resolution of a specified majority of the certificate holders at meetings convened for the purpose. But it cannot be doubted that, if at any time the whole of the certificate holders required the trust to be terminated or altered in a specific request, effect would have to be given to their requirements. Equally, if in any given year all the certificate holders required that the balance of the amount available for distribution should not be added to capital as contemplated, effect would have to be given to their requirement. The court would not enforce that provision against their unanimous wish, with the result that section 164 of the Law of Property Act, 1925, has no application: *Wharton v. Masterman*.⁶

⁵ 9 Hare 177.

⁶ [1895] A.C. 186.

It was argued that, as the remuneration of the managers is to be calculated by reference to the value of the trust, it would not be open to the certificate holders, acting unanimously, to require that in a given year effect should not be given to the direction to add the balance available for distribution to capital. In my view there is no force in this suggestion, and I only mention it to show that I have not failed to take it into consideration.

Lastly, I would observe this: assume that section 164 does apply, and that the effect of its application is to make void the provision at the end of clause 21 for adding the balance of the amount available for distribution to capital. The result, as Mr. Arnold pointed out, is very curious. In that case the latter part of section 164 (1) would come into operation. It reads: "and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed." Now the persons who would have been entitled to the balance are, having regard to clause 12 of the trust deed, the certificate holders themselves, but, the section having exhausted itself, they would be entitled to make an arrangement under which the amount in question should be added to capital and thus give effect to the provisions which, on the hypothesis on which I have proceeded, the section makes void. This appears to me to afford further support for the conclusion to which I have come, namely, that the section does not apply at all.

Declaration accordingly.

Solicitors: *Coward, Chance & Co.; Linklaters & Paines.*

J. L. D.

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[1956 S. 2166.]

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Upjohn J.

Trust—Uncertainty, trust void for—Unascertainable class—Power to make payments to or on behalf of company's "employees," "ex-employees," their "widows, infant children or other infant dependants" and "other dependent relatives"—Power collateral

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—Provision for winding up of company—Power subsequently to purchase annuities for persons actually or potentially eligible—Ultimate trust of surplus for benefit of employees or ex-employees—Whether powers and trusts valid.
Trust—Possibility of execution by court—Power—Power collateral—No exercise of power or execution of trust—Ultimate trust by operation of law in favour of settlor—Whether court will execute ultimate trust.

By a trust deed made between a settlor, M., and Martins Bank Ltd., a fund was settled on trusts for employees and ex-employees of S. Ltd. It was provided that the fund be administered by a committee of management of which the settlor (the then governing director of the company), M. (an employee) and the company's auditor for the time being were to be the first members. Clause 4 provided that no person should have any right to payment from the fund, all grants from which were to be at the discretion of the committee, which was empowered in each case to make payments by way of life annuities, or for terms of years, or by way of lump sum grants, to or on behalf of the company's "employees," "ex-employees," their "widows, infant children or other infant dependants" and "other dependent relatives." Clause 6 provided for winding up in certain events and that the committee, after providing for expenses, might then apply the fund to buying annuities for any beneficiaries for the time being receiving allowances from the fund, or for such other persons then actually or potentially eligible as the committee might select. The surplus was to be used for the benefit of employees or ex-employees as the committee should think appropriate in the circumstances.

By this summons, to which the settlor and M. were defendants, the auditor and the bank (as custodian trustee of the fund) asked, inter alia, whether the trusts, powers and provisions in clause 4 pending the final distribution of the fund were valid or void for uncertainty; whether the trusts in clause 6 for its final distribution were valid or void for uncertainty; and whether the income and capital of the fund had as from the date of the execution of the deed been held on a resulting trust for the settlor.

It was common ground that the committee would be exercising a power collateral (i.e., not coupled with a duty) in making grants under clause 4 or in buying annuities on a winding up:—

Held, in deciding that the ultimate trust was void but that the powers exercisable by the committee during the trust period and on its determination were valid:

(1) That as, on the evidence, it was impossible to make a complete list of persons who had been employed by the company since its incorporation, the trust to distribute the surplus was necessarily void, and the ultimate surplus was held on a resulting trust for the settlor.

Inland Revenue Commissioners v. Broadway Cottages Trust [1955] Ch. 20; [1954] 3 All E.R. 120 applied.

(2) That since, to exercise the powers collateral, it was not necessary to ascertain a whole class of beneficiaries, but only whether

a particular praepositus was an object of the power (see *In re Gestetner Settlement* [1953] Ch. 672; [1953] 1 All E.R. 1150 and *In re Coates* [1955] Ch. 495; [1955] 1 All E.R. 26), and since there was sufficient certainty in clause 4 of the deed to make that possible, the question whether any particular praepositus was a "dependant" or a "dependent relative" could be answered by the committee or by the court.

In re Ball [1947] Ch. 228; 63 T.L.R. 94; [1947] 1 All E.R. 458, *In re Hooper's (1949) Settlement* (1955) 34 A.T.C. 3 and *Simmons v. White Bros.* [1899] 1 Q.B. 1005 considered.

(3) That the absence of a gift over on failure to exercise any of the powers did not make the power invalid and inoperative so that the fund was held on trust for the settlor from the execution of the deed, as, in default of the execution of the trust to distribute the surplus, there arose by operation of law a trust in favour of the settlor which the court would execute.

ADJOURNED SUMMONS.

The following facts are taken from the judgment: This was a summons to determine the validity of certain powers and provisions in a trust deed dated February 14, 1950, whereby a certain sum was settled, putting it very briefly, on trusts for employees, ex-employees and their dependants of a company known as Sayers (Confectioners) Ltd., of which the settlor, the first defendant, was at the time governing director, though he had since given up that position.

The deed was made between the first defendant of the first part, William McGee, the second defendant, of the second part and the plaintiffs, Martins Bank, of the third part. The first recital was as follows: "Whereas (a) the settlor is governing "director of Sayers (Confectioners) Ltd. (hereinafter called 'the "company') and has considered it desirable that a fund (hereinafter called 'the fund') should be formed to provide for "discretionary grants allowances annuities or payments to or "for the benefit of employees or ex-employees of the company "or of any wholly owned subsidiary of the company or their "dependants and with that end in view has transferred certain "investments to the fund and may hereafter transfer further "investments and/or sums of money thereto." The operative part, the first clause, set up the fund; the second clause provided for the administration of the fund by a committee of management. The first members of the committee were to be the settlor, Mr. William McGee as an employee of the company, and the third member was to be the auditor for the time being of the company—that was, Mr. MacGregor, the first plaintiff.

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Clause 3 of the deed made administrative provisions and it was to be noted that no differentiation was made between the capital and income of the fund. Each alike were available for grants in accordance with the provisions of clause 4, which provided: “ (a) All grants allowances and benefits whatsoever out of the fund shall be at the discretion of the committee and no person shall have any claim or right whatsoever to receive any payment therefrom. The committee is empowered at its discretion in each individual case to make payments out of the fund by way of annuity for life or for a term of years or other period or by way of lump sum grants as the committee shall decide to or on behalf of the following persons or any one or more of them namely: (i) To employees in the company’s service on or after ceasing to be employed in such service or to persons who have been employees in such service and have already ceased to be employed in such service in whose case the committee decides that assistance is merited by the special circumstances of such ex-employee. (ii) To such employees as above whilst still in the company’s service in whose cases the committee decides that assistance from the fund to meet special circumstances of need is merited. (iii) To widows of such employees or ex-employees as are above mentioned whether such employees or ex-employees died whilst in or after leaving the company’s service in whose cases the company decides that assistance is merited. (iv) To infant children or other infant dependants of any such employees or ex-employees as are above mentioned in which cases payment may be made to such person as the committee elects to treat in each such case as having the care and custody (legal or otherwise) of the infant concerned without being under further responsibility of inquiry. (v) To other dependent relatives of any such employees or ex-employees as are above mentioned in whose cases the committee decides that such assistance is merited.” Clause 5 provided for the amendment of the deed and clause 6 provided for winding up in certain events. It was admitted that the duration of the trust was properly limited so as not to infringe the rule against perpetuities. Clause 6 continued: “ In the event of any such winding up the committee (who shall continue in office notwithstanding the winding up or that by reason of the cessation of the company’s existence its members have ceased to be the directors or employees of the company) may at their discretion apply the whole or such part of the fund then in the trustees’ hands (both capital and unapplied income) after

“paying or providing for all administration expenses incurred
 “but unpaid at the date of such winding up and the costs and
 “expenses of and incidental to such winding up to the purchase
 “of annuities for any beneficiaries for the time being in receipt
 “of allowances out of the fund or for such other persons then
 “eligible or potentially eligible to receive such allowances as the
 “committee may select. The surplus if any then remaining in
 “the trustees’ hands shall be used for such purpose and in such
 “manner for the benefit of employees or ex-employees of the
 “company as the committee thinks most appropriate in the
 “circumstances then existing and upon the completion of such
 “winding up the committee and trustees shall be discharged
 “from all the duties and trusts hereof and from all further
 “responsibility with regard to the fund.”

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This summons was taken out for the determination of the questions whether the trusts, powers and provisions, contained in the deed, for the benefit of employees and ex-employees of Sayers (Confectioners) Ltd. (hereinafter called “the company”), their widows, children or “other infant dependants” and “other dependent relatives” were valid or void for uncertainty, whether the trusts for the final distribution of the fund were valid or were so void, and whether the income and capital of the fund were held as from the date of the execution of the deed on a resulting trust for the settlor of the fund.

Eric Griffith for the plaintiffs.

John Pennycuick Q.C. and *William Geddes* for the settlor. The settlor and the employees agree that (1) the power under clause 4 as to grants, allowances and benefits, and (2) the power under clause 6 to buy annuities out of the fund are powers not coupled with a duty—“powers collateral.” The subsequent direction that “. . . the surplus . . . shall be used for . . . the benefit of “employees or ex-employees” purports to create a trust which, it is contended, is void. On the evidence that must be so, since the number of the company’s branches and the constantly drifting nature of its personnel (consisting largely of employees who often change their jobs) must defeat even the most unflagging efforts to keep track of employees. It must, accordingly, follow that there is a resulting trust of the ultimate surplus in the settlor’s favour.

As to the exercise of the power while the fund is in being and on the winding up of the fund, the words “employees,” “persons who have been employees” and “ex-employees” in clause 4 (i), import sufficient certainty to prevent invalidation of

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the power, because it is sufficient to be able to ascertain whether any particular person is so describable and so is an object of the power: *In re Gestetner Settlement*¹; *Inland Revenue Commissioners v. Broadway Cottages Trust*²; *In re Coates*.³ In paragraphs (iv) and (v), however, the element of certainty is insufficient, for, while a power to appoint among "relatives" is valid, the descriptions "other infant dependants" and "other dependent relatives" are not sufficiently precise. True, there is a conflict of authority on whether the word "dependants" has enough certainty. It was held in *In re Ball*,⁴ which dealt with a will, that it has not; in *In re Hooper's (1949) Settlement*⁵ that it has. True, also, a "dependant" has been described as a person who not only derives benefit from another's pecuniary earnings but is also to some extent dependent on that other for the necessities of life: *Simmons v. White Brothers*.⁶ That, however, was a workmen's compensation case and the "other" from whose earnings pecuniary benefit was derived was a workman. A description of "dependants" in such a case will not help to elucidate the meaning of "dependent relatives" in the present case.

Lastly, if, as in the present case, property is by deed vested in trustees on such terms that they have a power not coupled with a trust to apply all or any part of the income among specified objects but there is no gift over in default of appointment, the power is void and ineffective. A trust purported to be created by such a deed is not one to which effect can be given and so is not valid: *Morice v. The Bishop of Durham*.⁷ If, however, the deed expressly creates, or there must on its true construction be implied, a trust in favour of the settlor, the power is valid because, on failure to exercise it, the trust will operate.

Geoffrey Cross Q.C. and *Joseph Turner* for the employees. With regard to the expression "dependent relatives," there is a distinction between the certainty required when there is a trust in their favour and that required when a power is exercisable in their favour.

[UPJOHN J. The degree of qualification is the same in both cases.]

¹ [1953] Ch. 672; [1953] 1 All E.R. 1150.

² [1955] Ch. 20.

³ [1955] Ch. 495; [1955] 1 All E.R. 26.

⁴ [1947] Ch. 228; 63 T.L.R. 94; [1947] 1 All E.R. 458.

⁵ (1955) 34 A.T.C. 3.

⁶ [1899] 1 Q.B. 1005; 15 T.L.R. 263.

⁷ (1805) 10 Ves. 521.

If there is no distinction the degree of certainty required is one which brings a clear picture to the judge's mind, as it apparently did in *Simmons v. White Brothers*⁸ and *In re Ball*.⁹ In the latter case there was a gift to a named son or his dependants equally, while in *In re Hooper's (1949) Settlement*¹⁰ there was a trust to pay and apply income as the trustees should in their absolute discretion think fit for any one or more of certain specified purposes. Therefore the court need not consider those authorities on the footing that they are conflicting, since in the one there was a trust to distribute among specified objects and in the other a power to select at absolute discretion. The expression "dependent relatives" is quite adequate to describe to the court the persons intended to benefit, while, for example, the word "friends" could not be so, since it would not by itself make clear which friends were intended. *In re Gresham's Settlement*¹¹ dealt with a discretionary power to pay income for the benefit of, among others, persons "with whom the husband might from "time to time be . . . residing . . .," and it was held that the power was void for uncertainty, being a single unseverable power and so ambiguous in its terms, especially in the use of the word "residing," that in the case of many persons it could not be postulated whether they were or were not within the designated class. In *In re Combe*¹² it was not suggested by anybody that the absence of a gift over in default of appointment invalidated the power. Had that contention been made and accepted, it would have been a complete answer in that case.

John Pennyquick Q.C. in reply. In *Simmons v. White Brothers*¹³ the definition of "dependants" was very narrow and was not the ordinary meaning of that word. What "dependants" receive amounts to somewhat more than the ordinary necessities of life—usually, indeed, includes jam as well as bread and butter.

Apparently *In re Ball*¹⁴ was not cited in *In re Hooper's (1949) Settlement*,¹⁵ and the court ought therefore to consider both cases.

UPJOHN J. stated the facts and continued: Two main questions arise. It is common ground that in exercising their powers under clause 4 of the deed to make grants, allowances

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⁸ [1899] 1 Q.B. 1005.

⁹ [1947] Ch. 228.

¹⁰ 34 A.T.C. 3.

¹¹ [1956] 1 W.L.R. 573; [1956] 2 All E.R. 193.

¹² [1925] Ch. 210.

¹³ [1899] 1 Q.B. 1005.

¹⁴ [1947] Ch. 228.

¹⁵ 34 A.T.C. 3.

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and benefits the committee are exercising a power which is not coupled with a duty. It has been called in the cases a power collateral. Similarly, if and when the fund is wound up under the provisions of clause 6 it is again common ground that, on the winding up, the committee have a power as to purchasing the annuities and so forth which again is a power collateral not coupled with a duty or trust. It is when the clause speaks of the disposition of the surplus remaining in the trustees' hands that a trust to distribute arises for the first time.

The first question is whether that trust to distribute is or is not valid. It is not in dispute that a trust to distribute a fund can be valid only if it is possible to ascertain the members of the class with sufficient certainty. If the members of the class are not ascertainable, then the trust is invalid and void. That was decided in *Inland Revenue Commissioners v. Broadway Cottages Trust*,¹ a decision of the Court of Appeal.

The objects of the trust, it is clear, are the employees or ex-employees of the company. Evidence is, of course, admissible whether that trust to distribute amongst the employees or ex-employees is sufficiently certain. The evidence in this case, contained in the affidavit of the plaintiff, Mr. MacGregor, makes it clear beyond any doubt that it is quite impossible to ascertain who are the ex-employees of the company. The main reason for that is this. The company carries on in certain towns the business of confectioners. I am told (though I think it is not in evidence) that it has some 70 shops. A large number of its employees are young ladies who are shop assistants and one is not surprised to learn from the affidavit that that class of shop assistant is one which frequently tends to change its employment. Therefore, although the evidence shows that this company makes the most valiant efforts to keep a record of its employees, it has in fact proved quite impossible to make a list of ex-employees which bears any relationship to accuracy. I might sum up the evidence in the words of Mr. MacGregor in paragraph 5 of his affidavit: "Although it would be possible for "the trustees or committee of management of the fund at any "given time to obtain or prepare a list of the persons employed "by the company at that time it was, on February 14, 1950,"—that was the date of the deed—"and is now, impossible to make "a complete list of all the persons who have been employed by "the company since its incorporation on April 20, 1931." It

¹ [1955] Ch. 20; [1954] 3 All E.R. 120.

follows from that that the trust to distribute the surplus is necessarily void and therefore the ultimate surplus is held on a resulting trust for the settlor.

A different and difficult problem arises, however, with regard to the exercise of the powers during the life of the fund under clause 4 and on the winding up of the fund under clause 6, those both being, as I have said, not trust powers but powers collateral.

In such a case the authorities establish that it is not necessary that the whole class of possible beneficiaries should be ascertained or ascertainable. That is in complete contrast, of course, with the case of a trust power. It is enough, if it is possible to treat it with sufficient certainty, whether any particular praepositus is an object of the power or not. That was decided in *In re Gestetner Settlement*,² which, I think, must be taken to have been approved by the Court of Appeal in *Inland Revenue Commissioners v. Broadway Cottages Trust*,³ to which I have already referred, and was followed by Roxburgh J. in *In re Coates*.⁴

That being the law, I turn to clause 4 to see whether there is sufficient certainty in that clause. Mr. Pennycuik, for the settlor, concedes that there is sufficient certainty in paragraph (i) because, although one cannot ascertain at any given moment who are all the ex-employees of the company, one can, he admits, ascertain whether any particular praepositus is one who it is correct to describe as having been employed by the company. There might, of course, be difficulties of proof in particular cases, but those difficulties must be solved by the committee, or, if necessary, by the court, by the ordinary methods of proof. There is no difficulty in paragraph (iii), concerning the widows of ex-employees, for the like reason. There again, difficulties may arise in individual cases, but it is possible to ascertain whether a particular person is one of whom it is proper to say that she is a widow of someone who has been employed by the company.

Mr. Pennycuik directs his attack on these powers by reason of the contents of sub-paragraphs (iv) and (v). He attacks it because he says that a gift to "other infant dependants of "employees or ex-employees" and a gift to "other dependent "relatives of any such employees" is too vague to satisfy the

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² [1953] Ch. 672; [1953] 1 All E.R. 1150.

³ [1955] Ch. 20.

¹ Ch. 1957.

⁴ [1955] Ch. 495; [1955] 1 All E.R. 26.

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necessary test of certainty. He does not attack the gift to dependent relatives on the ground that "relatives" is a word which is too vague. He concedes, quite properly, on the authorities, that a power to appoint among relatives is good. There might have been difficulties if it had been a trust to distribute among relatives, for, in a document which is inter vivos and not testamentary, it may be that "relatives," which cannot be read as next-of-kin, is itself too vague; but that does not arise in this case. Therefore, his challenge is directed entirely to the reference to infant dependants and other dependent relatives. He submits that those phrases import a qualification which is so uncertain and vague as to make it impossible to predicate with the requisite certainty whether or not a particular person is an object of the power. It seems to me logically that where an alleged uncertainty lies not in some uncertainty in fact—for instance, in the impossibility of ascertaining ex-employees, as in this case—but lies in the alleged uncertainty in the language used to describe the qualifications necessary for inclusion among the objects of the power, the problem is the same whether one has to consider a power of selection or trust to divide.

For this reason I am unable to accept Mr. Cross's attractive argument that I am relieved of the duty of considering two allegedly conflicting authorities, which I shall have to mention in a moment, on the ground that one is a trust to distribute and the other a power to select. I think the problem which I have to endeavour to solve is conveniently stated in the judgment of Roxburgh J. in *In re Coates*,⁵ although it does not make the solution any easier. The passage is: "This question of "uncertainty is a vexed question. Of course, language draws a "series of mental pictures in the mind of the person hearing the "words spoken. Those pictures are sometimes fairly well defined, "and sometimes blurred in outline, but they are never very "precise. Language is a medium which disdains mathematical "rules. I, for my part, accept as my guide the words of Lord "Tomlin in *In re Ogden* ⁶ cited by Harman J. in *In re Gestetner "Settlement*.⁷ Lord Tomlin said ⁸: 'The question is one of "'degree in each case, whether, having regard to the language "'of the will, and the circumstances of the case, there is such "'uncertainty as to justify the court coming to the conclusion "'that the gift is bad.' That appears to me to be all that can "possibly be said on the subject of uncertainty."

⁵ [1955] Ch. 495, 498.

⁶ [1933] Ch. 678; 49 T.L.R. 341.

⁷ [1953] Ch. 672, 686.

⁸ [1933] Ch. 678, 682.

The first of these conflicting authorities is *In re Ball*,⁹ also a decision of Roxburgh J. The headnote is very short and I will read it. "A will contained a gift 'to my son C. or his dependants equally':—*Held*, that there is not sufficient certainty about the word 'dependants,' when occurring in a will, to enable the court to give effect to a gift to 'dependants': and that, therefore, as the gift to 'dependants,' in the case before the court, was substitutionary and incapable of taking effect, the gift to the son C. took effect as an absolute and indefeasible gift." During the argument reference was made to the Workmen's Compensation Act and the Inheritance (Family Provision) Act, 1938. The judgment is short, so I will read the whole of it. Roxburgh J. said¹⁰: "It is surprising that the word 'dependants' has, apparently, not been considered in any reported case on the construction of a will. It has been given statutory definition in the Workmen's Compensation Act, 1925, and in the Inheritance (Family Provision) Act, 1938. Those two definitions are, however, mutually exclusive and that in itself shows that I could not apply either of them as a suitable definition of the word 'dependants' in a will. Mr. Baden Fuller, for the son Charles' three children, has suggested two possible definitions: first, 'a person who to some extent depends on others for the provision of the ordinary necessities of life'; secondly, 'a person to some extent maintained by another.' If that is the best that can be done in the way of definition—and I have no reason to think that anything better can be done—there is not sufficient certainty about the word 'dependants' in a will to enable the court to give effect to it. Therefore, as the gifts to 'dependants' in the present case is a substitutionary gift and is, in my judgment, incapable of taking effect, the gift to the son Charles Ball takes effect as an absolute and indefeasible gift, and I so hold."

The other is *In re Hooper's (1949) Settlement*,¹¹ in which there was a settlement for the benefit of employees and ex-employees and their dependants on the same broad lines as in the case before me. The clause dealing with dependants was in these terms: "5. The trustees shall during the trust period pay and apply any income arising from the trust fund as they shall in their absolute discretion think fit for the purposes following or any one or more of them that is to say . . . (b) in making any grant allowance or gift to Doulton's employees or any one or

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⁹ [1947] Ch. 228; 63 T.L.R. 94;
[1947] 1 All E.R. 458.

¹⁰ [1947] Ch. 228, 230.

¹¹ (1955) 34 A.T.C. 3.

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"more of them, whether by way of making provision during sickness or permanent or temporary incapacity or to their wives widows children or dependants or otherwise as the trustees may think fit. . . ." A number of matters were discussed in that case, but the judge dealt quite shortly with the point concerning the meaning of the word "dependants." He said¹²: "But Mr. Stamp says that that leaves out of account this much more dangerous word or this uncertain description, 'dependants.' He says 'dependants' is a very uncertain word, and one which would give great difficulty in regard to the ascertainment of every possible beneficiary in the present case. No doubt that increases the class or widens the class which has to be considered, but it does not seem to me that it is more than a question of fact, once you have ascertained the names of the employees and of the dependants they have or may have had. That seems to me perfectly possible of ascertainment."

So far as appears from the report, *In re Ball*¹³ was not cited to the judge. It is also true that he does not, at any rate in any detail, deal with the question of the quality of the word "dependant" which of itself is said to lead to uncertainty.

Then I was referred by way of illustration to an authority under the Workmen's Compensation Act. It is clear, as Roxburgh J. said, that authorities on particular words used in the Workmen's Compensation Act cannot be decisive of this question. But I have been referred to one case which I think is helpful, *Simmons v. White Brothers*.¹⁴ The headnote is: "By s. 7, subs. (2) of the Workmen's Compensation Act, 1897, 'the word 'dependants' means 'in England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death.' " Perhaps that is not a very satisfactory method of trying to define a dependant, but there it is. It was held "that, in order to bring himself within the Act as a dependant, an applicant for compensation must show that he was to some extent dependent upon the earnings of the deceased workman for the ordinary necessities of life, having regard to his class and position in life; it is insufficient that he merely derived pecuniary benefit from such earnings. Whether an applicant is in that sense a dependant is a question of fact in each particular case." In

¹² 34 A.T.C. 7.¹³ [1947] Ch. 228.¹⁴ [1899] 1 Q.B. 1005, 1007; 15 T.L.R. 263.

that case a boy of some 14 years of age was accidentally killed after he had been in the employ of the employers for some five weeks. His wages were 17s. a week, which he handed to his parents. The county court judge reached the conclusion, at first sight a little surprising, that the parents were dependants on their son, a boy of 14. The Court of Appeal held that it was really a question of fact and that they could not disturb the county court judge's finding. Collins L.J. approved a passage to be found in Minton-Senhouse and Emery on Accidents to Workmen in these terms: "It would be hopeless to attempt to lay down any rule of guidance, because every case would probably differ in some material circumstance from almost every other. Dependent probably means dependent for the ordinary necessities of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator." Romer L.J. agreed and he said ¹⁵: "As a question of principle is to some extent involved in the present case, I desire to say that I agree with the passage in Minton-Senhouse and Emery on Accidents to Workmen, and that in my judgment a 'dependant,' in order to get compensation, must be dependent in the proper sense of that term, and that it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent on him for the ordinary necessities of life, having regard to his class and position in life." It does seem from that that Sir Robert Romer did think that there might be such a thing as a dependant in the proper sense of the term. But, of course, the problem which they had to consider is different from that which I have to consider. One cannot say that a definition in an Act of Parliament is void for uncertainty—one has to make it work as best one can.

The problem which I have to consider is whether the use of the words "dependants" or "dependent relatives" in a deed such as this is too vague and uncertain. The real problem I have to consider is this: Does a gift to the dependent relatives of employees in a deed of gift give to the court a sufficiently clear picture of the requirements to be satisfied to qualify the object

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¹⁵ [1899] 1 Q.B. 1005, 1008.

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of the power as a member of the class or is some further definition required? Mr. Cross submitted that a gift to "friends" standing alone would clearly be too vague and too uncertain for it would instantly provoke the query "what friends?" On the other hand, Mr. Pennycuick has enlarged on a number of examples and on the many difficulties which would arise in many cases. One can see that there may be many difficulties in deciding in any particular case whether it was proper to describe somebody as a dependent relative or not. I think the solution to this case is this. I do not think that it is really governed by cases on wills, the correctness of which I do not challenge. Different considerations may well arise when a testator is talking of a gift to his dependent relatives. This is a deed providing for dependent relatives of employees or ex-employees of a company, which is a very different thing. I think that this problem must be approached in a practical way. Here is a committee consisting of three business men, the settlor (the governing director), Mr. McGee, an employee representing the employees, and the first plaintiff, the auditor. They are administering a trust which is for the benefit of employees, ex-employees, and the dependent relatives of employees or ex-employees. I do not believe, although there may be difficult cases, that it is impossible to decide who qualifies as a dependent relative. Dealing with the class of employees of this very considerable company and exercising ordinary common sense, I think that the committee and, if necessary, the court, can come to a conclusion in any given case whether or not a particular *praepositus* is properly described as a "dependant relative." Accordingly, in my judgment, the provisions in clause 4 of the deed so far as that point is concerned are valid. It is common ground that, if that be so with regard to clause 4, the same result must follow with regard to the powers contained in clause 6 which arise on the winding up of the fund.

But Mr. Pennycuick has another point with which I must now deal. It is this. He submits that if property is vested in trustees with a mere power, not coupled with a trust to distribute it among a class, with no gift over on failure to exercise that power, that is to say, no gift over either expressed in the deed or to be implied on construction of the deed itself, then the power to appoint is in fact invalid and inoperative and the property is held by the trustees on trust for the settlor. He says in such a deed as he envisages there is no trust which the court can execute. He relies on the well-known principle set out in

the judgment of Lord Eldon in *Morice v. The Bishop of Durham*,¹⁶ that if there is no trust that the court can execute then it cannot be a valid trust. However, he is driven to concede that if in a particular case there was either expressly or to be implied from a proper interpretation of the deed a trust for the settlor in default of the exercise of the power, in that case the power would be valid because in default of its exercise there is an express trust in the deed for the settlor. That argument seems to me a startling one. If the deed expresses what the law would otherwise imply the point admittedly goes; but if the deed does not express it and the law implies what the deed might have expressed, the point is apparently a good one. It seems to me that, in principle, the presence of a trust which the court can execute is necessary to its validity, but the trust may be expressed or may be implied by operation of law. If in default of the exercise of a mere power there remains a trust by operation of law for the settlor that is a trust which the court will execute. It may be very simple to execute it by merely transferring the property to the settlor, but it is a trust which the court can execute: and, with all respect to the argument, I do not agree with it. No authority has been cited in favour of the proposition. As Mr. Cross has pointed out, it would have provided a very short answer in *In re Combe*,¹⁷ but the point, if it is one, was overlooked by so eminent a judge as Tomlin J. and so eminent a conveyancer as Sir Arthur Underhill. The point was apparently raised in *Inland Revenue Commissioners v. Broadway Cottages Trust*,¹⁸ but it was not dealt with directly by Jenkins L.J. in his judgment. As I have said, I do not agree with that point.

Accordingly, it follows that the powers during the life of the trust and the power which arises on the winding up of the trust are in my judgment valid, but the trust of the surplus is invalid, and I must declare accordingly.

Declaration accordingly.

Solicitors for all parties: *Batesons & Co., Liverpool.*

K. R. A. H.

¹⁶ (1805) 10 Ves. 521, 522.

¹⁸ [1955] Ch. 20.

¹⁷ [1925] Ch. 210.

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June 4

Danckwerts J.

In re COCKBURN'S WILL TRUSTS.
COCKBURN *v.* LEWIS.

[1957 C. 297.]

Executor and Administrator—Administrator—Trustee—Completion of administration—Whether administrators trustees of will with power to appoint new trustees—Trustee Act, 1925 (15 Geo. 5, c. 19), s. 36.

Three persons were appointed executors and trustees of a will, of whom two predeceased the testator and the third renounced probate. Two administrators with the will annexed were appointed and carried out their duties for a period of 10 years. A question arose relating to a scheme for the purpose of distributing the residuary estate, and a summons was taken out to determine whether the administrators, who had cleared the estate and completed the administration in the ordinary way, were trustees for the purposes of the will and at liberty to exercise the powers and discretions thereby conferred on the trustees for the time being of the will:—

Held, that the administrators, having duly completed their duties as administrators, had the power, under the trusts conferred by section 36 of the Trustee Act, 1925, to appoint new trustees (i.e., to appoint trustees of the will to act in their place) and that if they did not so appoint new trustees to execute the trusts of the will they themselves would become trustees in the full sense.

In re Ponder [1921] 2 Ch. 59 applied.

Harvell v. Foster [1954] 2 Q.B. 367; [1954] 2 All E.R. 736 distinguished.

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By his will dated November 28, 1928, the testator, Sir James Stanhope Cockburn, Bart., appointed three persons to be the executors and trustees thereof, and declared that references to his trustees should include them “and the survivors or survivor “of them or other the trustees or trustee for the time being of “this my will except where such construction is precluded by “the context.” The will contained a wide discretionary power of appropriation exercisable by the trustees. No person was nominated by the will for the purpose of appointing new trustees. By a codicil dated April 5, 1932, the testator gave certain directions to his trustees, which are not material for the purposes of this report.

The testator died on April 1, 1947. Two of the persons named in the will as executors and trustees died during the lifetime of the testator, and the third renounced probate.

On July 24, 1947, letters of administration with the will annexed were granted to James Francis Cockburn and Claude John Ledstone Lewis. The testator's widow, who had certain interests during her life under the will, died on May 20, 1953.

It being desirable that the residuary estate should be divided by a proper scheme of appropriation, the administrators were advised that they were probably not entitled, in their capacity as such, to exercise the discretionary power conferred by the testator on the trustees for the time being of the will, and that it was impracticable, in the events which had happened, to appoint new trustees without the assistance of the court.

A summons was, therefore, taken out by one of the administrators to determine (inter alia) whether the administrators were trustees for the purposes of the will and at liberty to exercise the powers and discretions thereby conferred on the trustees for the time being of the will.

E. I. Goulding, for the plaintiff administrator, stated the facts as above set out.

[DANCKWERTS J. referred to *In re Pitt*.¹]

V. G. H. Hallett, for the husband of a deceased daughter of the testator, cited *Harvell v. Foster*.²

G. M. Parbury for a beneficiary under the will.

J. L. Arnold for another beneficiary.

DANCKWERTS J., after stating the facts, continued: The question which I am asked to decide is whether the administrators of the estate, having cleared the estate and completed the administration in the ordinary way (the testator having been dead for about 10 years) are in a position to appoint new trustees of the will, and whether those new trustees, when so appointed by them, will continue to exercise the powers which are conferred by the will upon the trustees for the time being of the will. I feel no doubt about the matter at all. Whether persons are executors or administrators, once they have completed the administration in due course, they become trustees holding for the beneficiaries either on an intestacy or under the terms of the will, and are bound to carry out the duties of trustees, though in the case of personal representatives they cannot be compelled to go on indefinitely acting as trustees, and are entitled to appoint new

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¹ (1928) 44 T.L.R. 371.

² [1954] 2 Q.B. 367; [1954] 2 All E.R. 736.

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trustees in their place and thus clear themselves from those duties which were not expressly conferred on them under the terms of the testator's will and which, for that purpose, they are not bound to accept.

It seems to me that, if they do not appoint new trustees to proceed to execute the trusts of the will, they will become trustees in the full sense. Further, it seems to me that they have the power, under the trusts conferred by section 36 of the Trustee Act, 1925, to appoint new trustees of the will to act in their place. That seems to me to have been clearly established by the decision of Sargant J. in *In re Ponder*.¹

My attention has been called to the observations made in *Harvell v. Foster*,² which are obiter so far as they cast any doubt on the decision of Sargant J., and which, with all respect, I should have thought were not justified. The point in *Harvell v. Foster*² was a very different one. It was whether a personal representative, who had not duly completed his duties as personal representative, was under any liability to the persons who were interested in the estate in his capacity of administrator. I should have thought that there was no doubt that the answer was that, if he did not duly perform his duties, he was under such a liability. But that does not seem to me to have anything to do with the question whether a personal representative, who has completed his duties in a proper way, is or is not in a position to appoint new trustees. I feel no doubt whatever—and it has been recognized for a great number of years—that a personal representative in that position can appoint new trustees, and I so propose to declare. I therefore declare in the present case that the plaintiff and the first defendant are in a position to appoint trustees of the testator's will, who will be in a position to exercise the powers and discretions conferred upon the trustees of the will by the terms of the will and codicil.

Solicitors: *Fladgate & Co.; Frere, Cholmeley & Nicholson*s.

J. L. D.

¹ [1921] 2 Ch. 59.

² [1954] 2 Q.B. 367.

In re KNIGHT, DECED. *In re* WYNN, DECED.
 MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD.
 AND ANOTHER v. PARKER AND OTHERS.

C. A.

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 Apr. 2, 3,
 4, 16.

[1956 K. No. 195.]

Lord Evershed
 M.R.,
 Hodson and
 Romer L.JJ.

Power of Appointment—Special power—Exercise—Whether exercised by general words in appointor's will—“Including any property over which I may have any power of disposition at . . . death”—Whether intention to appoint.

Will—Construction—“Reddendo singula singulis.”

A testatrix gave her residuary estate on trust for sale and directed her trustees to stand possessed of the residue of the proceeds after payment of expenses on trust for a daughter and for the children of a deceased son and a daughter in specified shares. The residuary estate was expressed as “including any property over which I may have any power of disposition at the date of my “death.” Under the terms of the will of the testatrix's father she had a special power of appointment of a share of the residue of her father's estate amongst a class of objects which included all the persons who were beneficially entitled to her own residuary estate. The class of objects did not include her trustees:—

Held, that the intention to exercise a special power must be gathered from the whole will; and that the words used by the testatrix were not, in the context of her will, apt to exercise the special power of appointment conferred on her by her father's will.

In re Hayes [1901] 2 Ch. 529; 17 T.L.R. 740 applied.

Semble, that notwithstanding section 27 of the Wills Act, 1837,¹ the terms of a general power may be such that effective exercise requires express reference to the power and, therefore, a decision that a reference to “any power of disposition by will” does not, in a particular context, operate to exercise a special power does not necessarily make the reference meaningless and otiose.

¹ Wills Act, 1837, s. 27: “. . . a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary

“intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.”

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Observations in *In re Swinburne* (1884) 27 Ch.D. 696; *In re Teape's Trusts* (1873) L.R. 16 Eq. 442; *In re Boyd* (1890) 63 L.T. 92; *In re Mayhew* [1901] 1 Ch. 677; and *In re Welford's Will Trusts* [1946] 1 All E.R. 23 questioned.

Decision of Danckwerts J. reversed.

APPEAL from Danckwerts J.

By his will and codicil, both dated February 28, 1913, Frederick Knight (hereinafter called "the father") directed his trustees to hold his residuary estate, in the events which happened, as to one-half, on trust (subject to a life interest therein of his widow) to pay the income thereof, without power of anticipation during coverture, to his daughter, Mrs. Linda Margarita Wynn, for life; and after her death upon trust for the children or remoter issue of Mrs. Wynn "to be born and take "vested interests within 21 years after her death" at such times and ages and in such shares "and with such future or "other trusts for their benefit and such provisions for their "respective advancement . . . and maintenance and education "at the discretion of my trustees or any other person or persons" and in such manner as Mrs. Wynn should by deed or deeds revocable or irrevocable or by will or codicil appoint; and in default of and subject to any such appointment for the children of Mrs. Wynn, on attaining the age of 21 or (in the case of daughters) earlier marriage, in equal shares. There was a provision in usual form for hotchpot applicable to any unappointed share of any child of Mrs. Wynn in whose favour Mrs. Wynn had made any appointment. The father died on June 17, 1919.

Mrs. Wynn had three children—E. L. K. Stacpoole-Ryding, Mrs. V. M. K. Parker and Frederick K. Wynn—all of whom attained 21 years. By a deed of appointment dated October 20, 1921, on the occasion of the marriage of her second daughter to Leslie Edward Parker, Mrs. Wynn irrevocably appointed one third of her share of the moiety of her father's residuary estate, subject to the life interest of his widow, Mrs. Knight (who was then still living but had since died), and of herself. This deed was lost but notice of the deed of appointment was given to the father's trustees by the trustees of Mrs. Parker's marriage settlement, to whom Mrs. Parker had transferred her share. According to that notice Mrs. Wynn did not release (as she could not have done during the lifetime of her husband) her own life interest in the appointed share of her father's residuary estate.

Mrs. Parker died in 1945, survived by five children, John, Michael, Alan and Robin Parker and Constance Pamela Chivers. Frederick K. Wynn, the youngest child of Mrs. Wynn, died in 1945, leaving him surviving his widow and executrix (Mrs. Dorothy R. Price) and two children Michael Frederick Knight Wynn and Jeremy Wynn.

Mrs. Wynn made her last will on September 20, 1951. By the first clause she appointed the Midland Bank Executor and Trustee Co. Ltd. to be the trustees and executor of the will with the right to remuneration for their services in accordance with their published handbook, and she expressed the desire that unless the trustees saw reason to the contrary, her solicitor, Mr. Scott, should be employed as such in connexion with her estate.

By clause 2 of her will Mrs. Wynn gave legacies to her sister, Mrs. Beatrice K. Lever, to her daughter-in-law, Mrs. Dorothy Price, to Mr. Scott, and an equal legacy to each of her grandchildren, and she directed that "all duties payable in "respect" of the legacies "should be paid as part of my "testamentary expenses out of my general personal estate."

By clause 3, Mrs. Wynn, gave, devised and bequeathed: "all the residue and remainder of my real and personal estate "whatsoever and wheresoever whether in possession or reversion of which I may die possessed and including any property "over which I may have any power of disposition at the date of "my death unto the company upon trust to sell call in and "convert the same into money with full power for the company "in their absolute discretion to postpone such sale or conversion of any part or parts of my said estate for so long as they "shall think fit without being answerable for any loss resulting "from such postponement and I direct that the company shall "out of the proceeds of such sale calling in and conversion and "out of my ready moneys pay my funeral and testamentary "expenses and just debts and the legacies given by this my will "or any codicil hereto and the duties payable on such legacies "and bequests and shall stand possessed of the residue of the "said moneys and any part or parts of my said estate remaining "unconverted (being and hereinafter called 'my residuary "estate')." Upon trust (a) as to "one-third share thereof" for her daughter, Mrs. Stacpoole-Ryding, absolutely, with a provision in favour of that daughter's children in the event (which did not happen) of her predeceasing Mrs. Wynn; (b) as to "a further "one-third share thereof" to be divided equally between Mrs.

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Parker's children; and (c) Mrs. Wynn directed that the trustee company should "stand possessed of the remaining one-third "share of my residuary estate" for Michael and Jeremy Wynn, the children of her deceased son, in equal shares.

Mrs. Wynn died on March 7, 1955, survived by only one of her children, Mrs. Stacpoole-Ryding.

The trustees of the will of the father took out an originating summons in the Chancery Division asking whether the will of Mrs. Wynn operated as an exercise of the special power of appointment conferred on her by her father's will. Danckwerts J. held that it did so operate, and the surviving daughter of Mrs. Wynn, Mrs. Stacpoole-Ryding, and the widow of the deceased son of Mrs. Wynn appealed. The two children of the deceased son did not participate in the appeal as their interests were identical with those of their mother, Mrs. Price. At the time of the appeal both children were of full age.

Charles Russell Q.C. and *Bower Alcock* for Mrs. Stacpoole-Ryding (the daughter of the testatrix) and Mrs. Price (the executrix of the testatrix's deceased son). In determining whether the will of the testatrix operates to exercise the special power conferred on her, the court must consider the general form of her will and must be satisfied that, when read as a whole, it shows a clear intention to exercise the power. If there is any doubt the court leans against an exercise of the power. A reference to a power or to the property subject to it would normally suffice (*In re Weston's Settlement*²), but if there is no such reference and the intention has to be deduced from the language used, it is not sufficient to show that the words are capable of exercising the power; they must be fairly directed to it.

The many cases in which this question has been considered do not lay down any general principles of construction; it must in the end of all depend on the particular will; nor are the cases at first sight easily reconcilable. The cases may be grouped in the following four categories: (1) where the will did not use the word "appoint" and the court held that the special power had not been exercised: *In re Hayes*³ (the only case considered by the Court of Appeal); *Barretto v. Young*⁴; (2) where the word "appoint" was used but the court held that the power was not

² [1906] 2 Ch. 620.

⁴ [1900] 2 Ch. 339.

³ [1901] 2 Ch. 529; 17 T.L.R. 740.

exercised: *In re Beresford's Will Trusts*⁵; *In re Cotton*⁶; *In re Weston's Settlement*⁷; *In re Sanderson*⁸; *In re Slack's Settlement*⁹; (3) where "appoint" was used and the court held that the power was exercised: *In re Mayhew*¹⁰; *In re Milner*¹¹; *In re Ackerley*¹²; *In re Swinburne*¹³; *In re Mackenzie*,¹⁴ and (4) where the power was held to have been exercised without the word "appoint" having been used: *Cowx v. Foster*¹⁵ (which was doubted in *Clogstoun v. Walcott*¹⁶); *In re Teape's Trusts*¹⁷; *Thornton v. Thornton*.¹⁸

In *In re Holford's Settlement*¹⁹ it was suggested that it might be more difficult to show an intention to exercise a power where the effect would be to displace equality amongst a class than where the exercise of the power would benefit a surviving spouse. Many of the stronger decisions in groups (3) and (4) are cases of a surviving spouse and are, therefore, distinguishable on that ground from the present.

In several of the cases in which it was held that the power had been exercised the court was apparently influenced by the suggestion that otherwise no meaning or effect could be given to the reference in the wills in question to "any power of disposition" "by will," having regard to section 27 of the Wills Act, 1837. Examples are *In re Swinburne*²⁰; *In re Teape's Trusts*²¹; *In re Boyd*²²; *In re Mayhew*²³; *In re Welford Will Trusts*²⁴; *In re Latta's Marriage Settlement Trusts*,²⁵ and probably *In re Mackenzie*.²⁶ That argument is fallacious, for the terms of a general power may be such that effective exercise will require express reference to it. See *Prideaux, Precedents in Conveyancing*, 24th ed., vol. III, p. 718, No. 59; *Key and Elphinstone*, 15th ed., vol. 2, p. 921; and see also *In re Lane*,²⁷ where words similar to those in the present case were held to operate such a general power. Consequently, in such a case, a reference to "any power" "of disposition by will" would not be otiose even if it did not operate to exercise a special power.

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⁵ [1938] 3 All E.R. 566.⁶ (1888) 40 Ch.D. 41.⁷ [1906] 2 Ch. 620.⁸ (1912) 106 L.T. 26.⁹ [1923] 2 Ch. 359.¹⁰ [1901] 1 Ch. 677.¹¹ [1899] 1 Ch. 563.¹² [1913] 1 Ch. 510.¹³ (1884) 27 Ch.D. 696.¹⁴ [1917] 2 Ch. 58.¹⁵ (1860) 1 J. & H. 30.¹⁶ (1843) 13 Sim. 523.¹⁷ (1873) L.R. 16 Eq. 422.¹⁸ (1875) L.R. 20 Eq. 599.¹⁹ [1945] Ch. 21; 61 T.L.R. 47;
[1944] 2 All E.R. 462.²⁰ 27 Ch.D. 696.²¹ L.R. 16 Eq. 422.²² (1890) 63 L.T. 92.²³ [1901] 1 Ch. 677.²⁴ [1946] 1 All E.R. 23.²⁵ [1949] Ch. 490; [1949] 1 All
E.R. 665.²⁶ [1917] 2 Ch. 58.²⁷ [1908] 2 Ch. 581.

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Finally, the approach to the construction of the particular will as a whole may be criticized: *In re Ackerley*,²⁸ *Thornton v. Thornton*²⁹ and *In re Blackburn*.³⁰ [*Von Brockdorff v. Malcolm*³¹ was also referred to.]

R. W. Goff Q.C. and *M. M. Wheeler* for the children of Mrs. Parker (the testatrix's deceased daughter). [Their submissions on construction appear sufficiently from the judgment.] With regard to the authorities, the trend in the earlier cases was in favour of holding that the special power had been exercised, and that trend still continued. In the cases relied on by the appellants, where it had been held that the power had not been exercised, there were special circumstances and language differing from that found in the present will.

The argument that many of the decisions in Mr. Russell's groups (3) and (4) were based on a fallacious understanding of the scope of section 27 of the Wills Act is inapplicable, because it has not been shown that the words in question had been put in to deal with a general power of this unusual type which was already in existence or might be acquired in the future. Even if the words had been put in for that purpose, it would not follow that they would not apply to the special power which the testatrix had at the date of the will. The following cases cannot be explained away on the so-called heresy: *Bailey v. Lloyd*,³² *Ferrier v. Jay*³³ and *Von Brockdorff v. Malcolm*.³⁴ In addition to these, a decision in favour of the appellants would involve overruling part at least of the ratio of the following cases: *Pidgely v. Pidgely*³⁵; *In re Swinburne*³⁶; *In re Teape's Trusts*³⁷; *In re Mackenzie*³⁸; *In re Milner*³⁹; *In re Boyd*,⁴⁰ and *In re Mayhew*.⁴¹

The suggestion that the courts lean towards holding that a special power has been operated in favour of a surviving spouse more readily than in other cases is not supported by the authorities: see *In re Swinburne*⁴² (nephews and nieces) and *Von Brockdorff v. Malcolm*.⁴³

S. W. Templeman for the trustee company.

Russell Q.C. replied.

Cur. adv. vult.

²⁸ [1913] 1 Ch. 510.

²⁹ L.R. 20 Eq. 599.

³⁰ (1889) 43 Ch.D. 75.

³¹ (1885) 30 Ch.D. 172.

³² (1829) 5 Russ. 330.

³³ (1870) L.R. 10 Eq. 550.

³⁴ 30 Ch.D. 172.

³⁵ (1844) 1 Coll. 255.

³⁶ 27 Ch.D. 696.

³⁷ L.R. 16 Eq. 422.

³⁸ [1917] 2 Ch. 58.

³⁹ [1899] 1 Ch. 563.

⁴⁰ 63 L.T. 92.

⁴¹ [1901] 1 Ch. 677.

⁴² 27 Ch.D. 696.

⁴³ 30 Ch.D. 172.

April 16. LORD EVERSHERD M.R. The judgment I am about to read is the judgment of the court.

[His Lordship stated the facts and continued:] The question before us is whether Mrs. Wynn's will operated as an exercise of the power of appointment given to her by the will of Mr. Knight. The first thing to be noted about Mrs. Wynn's will is that apart from legacies to her sister, Mrs. Lever, and to her solicitor, a Mr. Scott, the only beneficiaries thereunder are her surviving daughter, daughter-in-law, and grandchildren, to all of whom she referred (as she did also in the case of her sister) in terms of affection.

Since the solution of the question presented to us depends upon the true interpretation to be given to the language of Mrs. Wynn's will, it is necessary to refer to it at some length. [His Lordship referred to the parts of the will set out above and continued:] It appears from the terms of the originating summons that the first plaintiff (the Midland Bank Executor and Trustee Co. Ltd.), are now, together with Mrs. Wynn's sister, Mrs. Lever, the trustees of the will of Mr. Knight, though it does not appear when they were so appointed. At the date of Mrs. Wynn's appointment in 1921 the trustees of Mr. Knight's will were Mrs. Knight, Mrs. Wynn's husband, and two other persons not parties to the present proceedings. Mr. Wynn and Mrs. Lever were (at that time) the trustees with another individual trustee of Mrs. Parker's marriage settlement.

It remains only to add that Mrs. Wynn had not at the date either of her will or her death any power of appointment, general or special, other than her special power under Mr. Knight's will. There is no evidence of any circumstances from which it might have been inferred that Mrs. Wynn either had or had not in mind that she had a testamentary power to appoint under her father's will: or had or had not in mind the terms of her father's will or the fact that she had made the appointment in Mrs. Parker's favour in 1921. But since (as we were informed) Mrs. Wynn's will was prepared by a solicitor, we may legitimately observe that the choice of the formula "... including any "property over which I may have a power of disposition at the "date of my death" cannot fairly or easily be attributed to a skilled draftsman who had been informed of the existence of the special power under Mr. Knight's will, let alone of its terms and the fact of its having already been exercised—or indeed of any limited power. Mrs. Wynn appears to have been in receipt of the income of a moiety of Mr. Knight's residuary estate up to

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the date of her death. It was stated in evidence that the value of that moiety was at Mrs. Wynn's death about £70,000; but that Mrs. Wynn had also free estate of her own of a substantial amount.

The question, then, is that which we have already stated—should the will of Mrs. Wynn be taken, upon its true effect and interpretation, to have exercised her limited power of appointment under Mr. Knight's will? We were informed that we could assume (a) that the first five defendants (the children of Mrs. Parker) were now equally entitled between them to the subject-matter of Mrs. Wynn's appointment in their mother's favour in 1921 and would be likewise entitled to any share of the moiety of Mr. Knight's estate going in default of appointment to Mrs. Parker's estate, and (b) that the sixth and seventh defendants (Michael and Jeremy Wynn) would similarly be entitled equally between them to any share of the same moiety going, in default of appointment to the estate of their father, Mrs. Wynn's son. It therefore follows that if Mrs. Wynn's will did not operate as an exercise of the special power, the moiety of Mr. Knight's residuary estate would be divisible (having regard to the hotchpot clause) between the first five defendants, the six and seventh defendants, and the eighth defendant (Mrs. Stacpoole-Ryding) in equal shares per stirpes, in the same way as would be divided also the free estate of Mrs. Wynn. If, on the other hand, the question posed should be answered affirmatively, then by the joint effect of Mrs. Wynn's two appointments—that by deed in 1921 and that by her will—the first five defendants, the Parker stirpes, would together take five-ninths, and the other two stirpes respectively only two-ninths each, of the moiety of Mr. Knight's residuary estate: though the three stirpes would take equally between them Mrs. Wynn's free estate.

It was the view of Danckwerts J. that the second of the two above alternatives provided the correct answer in the present case, which he regarded as governed by a number of decisions of which *In re Teape's Trusts*,¹ *In re Swinburne*,² *Von Brockdorff v. Malcolm*³ and *In re Welford's Will Trusts*⁴ were examples; and that the decisions in what Danckwerts J. called "the other "line of cases" (illustrated by *In re Weston's Settlement*⁵) were not applicable.

¹ (1873) L.R. 16 Eq. 442.

² (1884) 27 Ch.D. 696.

³ (1885) 30 Ch.D. 172.

⁴ [1946] 1 All E.R. 23.

⁵ [1906] 2 Ch. 620.

It will appear from the preceding sentence, and it is the fact, that a large number of cases has from time to time been before the courts in which the question for determination has been similar to that now before us, namely, whether wills expressed in language comparable to (but nevertheless in one respect or another different from) the language of Mrs. Wynn's will have, in the relevant circumstances of those cases, operated to exercise special powers of appointment. Counsel before us have very properly cited all these cases to us and commented upon them, on the one side or the other. It has been pointed out more than once in the later cases that the decisions are not easily reconcilable; and it is, we think, at any rate clear that the observation is justified. Only one of the cited cases came before the Court of Appeal, namely, that of *In re Hayes*,⁶ in which this court decided that the formula "all the residue of the property over which at the time of my death I shall have a disposing power," in the context of the will in which it appeared, was not effective to exercise a limited power of appointment to which the testator became entitled by an instrument made after the date of his will. We feel, however, no hesitation in adopting the correctness of the interlocutory observation in that case of Sir Robert Romer L.J.⁷: "The intention to exercise a special power must be gathered from the whole will. The cases do not lay down any general principles . . ."; and the Lord Justice added his authority to the view, already mentioned, that the decided cases are not easily reconcilable.

Since, therefore, none of the earlier decisions can be regarded as authority binding us in the present case, and since, moreover, the language used by Mrs. Wynn differs in some appreciable respects from all the cited instances, we first approach the present problem as one properly depending upon the effect and interpretation of the particular will which in the circumstances already narrated Mrs. Wynn chose to make. We shall later have to consider whether the conclusion which would, upon this approach, commend itself to us is affected or displaced by any results which from long usage or otherwise emerge from the earlier decisions.

If, then, the question be one of "intention" (to borrow Romer L.J.'s phrase) "to be gathered from the whole will" of Mrs. Wynn, then the principle to be applied is that common to all questions of construction of wills; namely, to discern what is

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⁶ [1901] 2 Ch. 529; 17 T.L.R. ⁷ [1901] 2 Ch. 531.

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the intention which the testatrix has expressed by the words which she has used, construed in their context according to their ordinary and proper sense. So much was indeed, by way of principle, stated by Sargant J. in one of the cases cited to us, that of *In re Ackerley*,⁸ where that judge, transposing similar language used by Buckley J. in *In re Weston's Settlement*,⁹ said¹⁰: “. . . that in order to exercise a special power there “ must be a sufficient expression or indication of intention in “ the will or other instrument alleged to exercise it; and that “ either a reference to the power or a reference to the property “ subject to the power constitutes in general a sufficient indication for the purpose.”

But in a case like the present, where there is reference neither to the power nor to the property subject to the power, it may be said that the general formula does not carry the matter very far: for the question remains, what degree of precision or aptness is requisite to qualify as an expression of intention? What assumptions (if any) should be made as to the testatrix's knowledge of the character, objects and incidents of the special power the exercise of which is in question? In a recent case of *In re Beresford's Will Trusts*¹¹ Morton J. (who expressed his own preference for the line of cases illustrated by *In re Weston's Settlement*¹²), was assisted to his own conclusion that a special power had not been exercised by a general formula bearing some resemblance to that contained in clause 3 of Mrs. Wynn's will (though the testator had also used the word “appoint”) by observing that, if the testator had intended to exercise the power, he must be taken deliberately to have done so by directions which, as regards both the objects and the incidents of the power, substantially departed from the terms of the power itself.

We are not satisfied that—at any rate where the words to be construed include so general a formula as that contained in Mrs. Wynn's will, namely, “any property over which I may “have any power of disposition at the date of my death”—it is safe or appropriate to test the question by assuming that the testator was conscious or aware of the terms and incidents of the power which he had. At the other extreme, as it were, it is said that the words “any power of disposition” must be taken to mean, literally, what they say; so that the testator must be treated as expressing the intention to exercise every power in

⁸ [1913] 1 Ch. 510.

⁹ [1906] 2 Ch. 620.

¹⁰ [1913] 1 Ch. 510, 515.

¹¹ [1938] 3 All E.R. 566.

¹² [1906] 2 Ch. 620.

fact vested in him, however limited or remote, and regardless altogether of the nature and terms of the power; with the result that, by an application of the principle known as *reddendo singula singulis*, all administrative and other difficulties and contradictions will be got over and the will can take effect as an exercise of the special power in question if and to the extent that the benefits in the end of all conferred are, and the persons to whom they are given are found to be, within the scope and objects of the power.

In our judgment this extreme view, by giving literal effect to a few words, ignores altogether the context in which they appear and stretches to an inappropriate and illegitimate extent the convenience of the rule "*reddendo singula singulis*." Moreover, if such be the proper method of construction, then the circumstance that the beneficiaries under the will of the suggested appointor are wholly or in part objects of the special power loses all significance from the point of view of interpretation. So in the present case Mr. Goff conceded that some limitation must, as a matter of sensible interpretation in their context, be placed upon the words "any power of disposition"; but he claimed that they should be construed as meaning "any powers which "enable me to create the beneficial interests hereafter stated."

In our judgment the problem in the present case, as a problem of discovering expressed intention, has to be solved by posing and answering the questions: "Having regard to the "general form of the will and the context in which the vital "words appear which are said to amount to an operation of the "special power, did Mrs. Wynn intend to exercise, so far as she "effectively could, any and every power that she might have? "Or did she mean to exercise only such powers as were available "and appropriate for making effective the dispositions in the "will?" If such are the proper questions, then, in our view, construing the will as a whole as best we can (and unembarrassed for the moment by any decided cases), we think that the answer is that Mrs. Wynn was not intending to exercise (to the extent she could effectively do so) every limited power that she might have: but meant only to exercise such powers as she might have at her death that would enable her to bring into, and make part of her general and disposable estate, for all the purposes of her will, property which was not, strictly speaking, her own; and that the words which she used were not sensibly apt to extend further. To put the matter in a sentence, we think that the words "any power of disposition" should in their context be

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taken to mean "any *relevant* power of disposition." In our view such is the cumulative effect of the many indications which, in this will, were relied upon by Mr. Russell as pointing, all of them, in that direction and which override the circumstance that, in this case, the beneficiaries happened (all of them) to be objects of the special power in question: having regard particularly to the fact, already noticed, that these beneficiaries were (with the few exceptions noted) the sole objects of Mrs. Wynn's bounty and were naturally so, being all her own surviving issue.

It is first to be noted that the duties in respect of the legacies given by clause 2 were directed to be paid as testamentary expenses "out of my general personal estate," which phrase we take to be clearly a reference to the subject-matter of the following clause. That clause opens with a general formula of which it may be said that many of the words used are repetitive and unnecessary but which at least shows that the true emphasis is upon its subject-matter, namely, the testatrix's *property* of all and every kind. The vital words which follow have, as it seems to us and in that context, the same emphasis and purpose—they are part of the comprehensive reference to all the testatrix's *property* of whatever kind. We think also that there is force in Mr. Russell's submission that the main purpose of the introduction of the words was to avoid the possibly limiting effect of the immediately preceding phrase "... of which I "may die possessed." Certainly, in that context, the reference to the future event of the testatrix's death lends no support to the view that she had in mind the special power already vested in her. Then the word "appoint," which may be said to have some technical significance, does not, after all, occur. The property is "given devised and bequeathed" to the first plaintiff (the trustee company) as her executor; and the first trust, expressed with elaboration, is a trust for sale and conversion with a power of postponement followed by a direction in common form for payment of funeral and testamentary expenses and of debts and legacies. It is no doubt true that administrative provisions of this kind should not and would not, however inappropriate in themselves, be necessarily regarded as fatal to a conclusion in favour of an expressed intention to exercise a special power—at least where that intention can, aliunde, be safely discerned; and there are authorities of long standing to that effect. But in this case such other indications as there are seem to us not to assist Mr. Goff. The subject-matter of the trust for conversion is expressly referred to as "my said estate"

—a phrase which we think lends reinforcement to the view already expressed that Mrs. Wynn conceived herself to be dealing and intended to deal only with that property which was in truth, or could for all her purposes be made, her estate. And the same phrase “my said estate” is again used at the end of the paragraph in reference to that which remains after the discharge of debts, legacies and testamentary expenses and which she thereupon defines as “my residuary estate”—words which are in terms repeated in the following paragraph (c) for the purposes of the gift to the sixth and seventh defendants.

Matters of construction must in the end of all depend upon the impression made upon the reader’s mind by the words that have been used. Such, indeed, is the purpose of language. But there remains the question whether a conclusion based upon our interpretation of the language used by Mrs. Wynn is consonant with authority. We have already observed more than once that the decided cases are not easily reconcilable and that (save for *In re Hayes*¹³) they are all decisions at first instance. Nevertheless, as Mr. Goff pointed out in his cogent argument, many of the cases are of long standing and it is true to say (as Mr. Goff argued) that the decisions to the effect that special powers had not been exercised were on the whole less hallowed by antiquity and could moreover (with the possible exception of *In re Sanderson*,¹⁴ where Neville J. based his short judgment on the circumstance, which has appealed to us in the present case, that the testator was “dealing with all his property in “the mass”) be shown to have turned on special considerations in the respective instruments before the judges which are not exactly found in the present case. Thus, by way of example, Eve J., in *In re Slack’s Settlement*,¹⁵ largely founded himself on the words “if any”; though those words qualified not the powers of disposition themselves but the property subject to the powers. Inevitably, however, decisions in cases of this kind must turn on particular words in particular wills, the conclusion upon any one of which cannot constitute direct authority for an instrument in different terms. Our view indeed in the present case is no more than a conclusion upon the effect, as we have read and understood it, of Mrs. Wynn’s will and cannot be regarded as intended to lay down some new guide for other cases arising hereafter upon different instruments.

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¹³ [1901] 2 Ch. 529.¹⁵ [1923] 2 Ch. 359.¹⁴ (1912) 106 L.T. 26.

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In the circumstances we do not think it would be useful to add to this judgment an analysis of the earlier cases. Such an analysis will be found in the judgment of Vaisey J. in the recent case of *In re Holford's Settlement*,¹⁶ and we gratefully adopt it. But we think we should refer to one matter which appears to have influenced the conclusion in more than one of the decisions that a special power had been exercised, namely, that otherwise no meaning or effect could, having regard to section 27 of the Wills Act, 1837, be given to the reference to "any powers of disposition by will." Thus in *In re Swinburne*¹⁷ Pearson J. thought that, unless he decided in favour of an exercise of the power, he would in effect be striking altogether out of the will the words there used "... over which I may have any power of disposition." The same point was made by Lord Selborne L.C. in *In re Teape's Trusts*,¹⁸ and by Stirling J. in *In re Boyd*.¹⁹ See also *In re Mayhew*²⁰ and *In re Welford*.²¹ With all respect to those very learned judges, it seems to us doubtful whether the argument is necessarily a valid one. Mr. Russell made the point that the terms of a general power may be such that an effective exercise requires that express reference be made to the power. It may be that such a qualification is not common—though it is to be found, e.g., in the last edition (15th) of Key and Elphinstone's *Precedents in Conveyancing*, vol. 2, at p. 921; and in *In re Lane*²² Swinfen-Eady J. held that a general power so qualified was effectively exercised by a form of words closely comparable to that with which we are concerned in the present case ("... and over which I shall have any power of disposition by will"). As Morton J. observed in *In re Beresford's Will Trusts*²³ the words "... [which I shall] have power to dispose" may, as a matter of English, properly mean "... power to dispose of as I think fit." We are not therefore inclined to agree with the view that the only alternative to a conclusion in favour of an exercise of a special power must be to treat a general phrase such as "any power of disposition" as otiose. But even if the corresponding words in the present case had to be treated as incapable of making any effective addition to the preceding general words we should not regard that result as

¹⁶ [1945] Ch. 21; 61 T.L.R. 47;²⁰ [1901] 1 Ch. 677.

[1944] 2 All E.R. 462.

²¹ [1946] 1 All E.R. 23.¹⁷ 27 Ch.D. 696.²² [1908] 2 Ch. 581.¹⁸ L.R. 16 Eq. 442.²³ [1938] 3 All E.R. 566, 569.¹⁹ (1890) 63 L.T. 92.

fatal to the view which we have formed, since (as we have earlier pointed out) many of those general words are, upon any view, merely repetitive and unnecessary.

In our judgment the appeal should be allowed.

Appeal allowed.

Solicitors: *Tuck & Mann for Wallace, Robinson & Morgan, Birmingham; Peake & Co. for Harold Gee & Williams, Bristol; E. B. V. Christian & Co. for Scott & Richards, Teignmouth.*

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[1955 M. 18.]

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Costs—Contempt of court—Taxation—Motion for committal or attachment—Respondents guilty of contempt—Order for payment of costs as between solicitor and client—Meaning—Whether costs to be taxed on indemnity basis—R.S.C., Ord. 65, r. 27 (29).

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Costs—"Solicitor and client." Barrister—Fees.

Lord Evershed
M.R.,
Hodson and
Romer L.JJ.

The plaintiff brought an action against the Carmarthen Corporation, which retained leading and junior counsel. Subsequently, the corporation, retaining the same counsel, moved to commit to prison or, alternatively, to obtain leave to issue writs of attachment against, the plaintiff and the editor and a reporter of a newspaper for contempt of court in writing, publishing and procuring to be published a certain article. The plaintiff, the editor and the reporter ultimately apologized to the court for their contempt, but at first contended by their own leading counsel that they had not been guilty of it. The court found them guilty of contempt, and ordered them to pay the corporation's costs of the motion as between solicitor and client. The taxing master reduced the corporation's leading counsel's fee from 300 to 100 guineas and junior counsel's fee from 200 to 67 guineas. On appeal from Danckwerts J., on a summons to review taxation, who considered that counsels' fees should be allowed in full:—

Held, (1) that the correct standard in taxing as between solicitor and client was, apart from exceptions which did not include the

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present case, as set out in R.S.C., Ord. 65, r. 27 (29).¹ In cases where the costs were payable by one party to another, as in the present case, a taxation on the basis of solicitor and client would not necessarily give complete indemnity to the party in whose favour the award had been made. Although an order might in cases of contempt of court be intended to be punitive, there was no scope for exceptional treatment and taxation must be on the ordinary basis, apart from agreement to the contrary.

Giles v. Randall [1915] 1 K.B. 290 applied.

(2) That the taxing master had applied the correct standard. Decision of Danckwerts J. reversed.

SUMMONS TO REVIEW TAXATION.

In 1955 the plaintiff, Keble Morgan (trading as Keble Morgan & Co.), brought an action for a declaration that he was entitled to carry on his business as an auctioneer in the market at Carmarthen and on the fairground, of which fairground he claimed to be the tenant of the Corporation of the County Borough of Carmarthen. Leading counsel and junior counsel were retained by the corporation, who, in 1956, moved before Vaisey J. to commit to prison or, alternatively, for leave to issue writs of attachment against, the plaintiff, Herbert Smith Gunn (the editor of the "Daily Sketch") and Peter Stewart (a reporter on the staff of the "Daily Sketch") for their contempt of court in writing, publishing and procuring to be published in the "Daily Sketch" in February, 1956, an article entitled "I'll break this 'ring,'" and that they be ordered to pay the costs of the motion. The same leading and junior counsel appeared for the corporation on the motion on which the respondents also were represented by leading and junior counsel but neither counsel were the same as those appearing for the corporation on the appeal.

When the motion was heard by Vaisey J. the respondents adopted the course frequently followed in such matters of saying first that no contempt had been committed, second, if there was a contempt it was a very small one; and third, and in any case, they offered an apology. Vaisey J. rejected the submission that

¹ Rules of Supreme Court, Ord. 65, r. 27: "The following . . . general regulations shall apply to . . . all taxations in the Supreme Court of Judicature. . . ." Sub-rule 29: "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of

"any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

there had been no contempt but he concluded that it was not a serious or grave contempt. It was an indiscretion rather than a deliberate disregard of the dignity and due process of the law. He made the following order: "The plaintiff and the respondents"—that is Stewart and Gunn—"by their counsel" apologizing and expressing their regret for writing, publishing and procuring to be published the said article or item of news, "this court doth not think fit to make any order on the motion" but doth order that the plaintiff and the respondents do pay "to the [corporation] their costs of the said motion, such costs to be taxed by the taxing master as between solicitor and client."

The corporation brought in their bill for taxation and amongst the items of disbursement of which they claimed payment were two items of counsels' fees. Objection was taken to the amount of these and the taxing master, having considered the objection, reduced them, disallowing a fee of 300 guineas to leading counsel, reducing it to 100 guineas, and reducing the fee of junior counsel from 200 guineas to 67 guineas. The corporation's objections to these disallowances and reductions were in substance as follows: Leading counsel was retained because the issues were of the highest importance to the corporation as the owner of one of the most important cattle markets in the British Isles. The contempt of court, a serious criminal charge, was made and established. Although the plaintiff and the respondents apologized, they all argued strenuously and persistently by leading counsel that there was no contempt. It was clearly proper for the corporation to brief leading counsel and, in view of the retainer (which was justified) they were bound, as a matter of etiquette, to brief the same leading counsel. The object of obtaining solicitor and client costs was (if not to give a complete indemnity) at least to provide for payment of costs on a more generous scale than as between party and party. The amount allowed (100 guineas) was much too small and not a fair and reasonable fee for leading counsel in the circumstances. At least 200 guineas should be allowed for leading counsel's brief fee as between solicitor and client, and the fee to junior counsel should also be increased proportionately.

The taxing master's answers to the objection taken by the corporation on the taxation were as follows: "The order made on this interlocutory motion was for payment by the respondents of the [corporation's] costs of the motion as between solicitor and client, which is the strictest of three bases of solicitor and

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“ client taxations. The order entitles the [corporation] in effect
 “ to party and party costs, but on more generous lines. On this
 “ basis, after careful consideration and giving due weight to the
 “ importance of the case, and applying the standard laid down
 “ in Order 65, r. 27 (29) Supreme Court Rules, I am of opinion
 “ that one hundred guineas is a fair and adequate fee for leading
 “ counsel on this motion with junior counsel’s fee in proportion.
 “ I accordingly overrule these objections.”

In October, 1956, the corporation took out a summons asking that the taxation be reviewed, that the corporation’s objections to the reduction of the items in question be allowed, and that the items be allowed.

Nigel S. S. Warren for the corporation.

Helenus Milmo for the plaintiff and the other respondents.

Cases cited in argument not referred to in the judgment:
*Ex parte Fenn*²; *In re G——’s Application for a Committal Order*³; *Theocharides v. Joannou*.⁴

DANCKWERTS J. This is an application to review taxation by the taxing master. I am not, of course, concerned with the merits of the action, which is concerned with a market owned by Carmarthen Corporation and has not yet come to trial. [His Lordship stated the facts and continued:]

No doubt the master, in framing his answers, had in mind *Giles v. Randall*,¹ the headnote of which states: “ By Order 65, “ r. 27, sub-r. (29) of the Rules of the Supreme Court, 1883, “ “ on every taxation the taxing master shall allow all such costs, “ “ charges, and expenses, as shall appear to him to have been “ “ necessary or proper for the attainment of justice or for “ “ defending the rights of any party, but save as against the “ “ party who incurred the same no costs shall be allowed which “ “ appear to the taxing master to have been incurred or increased “ “ through over-caution, negligence, or mistake, or by payment “ “ of special fees to counsel or special charges or expenses to “ “ witnesses or other persons, or by other unusual expenses.” ”

Buckley L.J. said²: “ There are three modes of taxation as “ between solicitor and client. The first is where a client is

² (1834) 2 Dowling’s Practice Cases 527.

³ [1954] 1 W.L.R. 1116; [1954] 2 All E.R. 794n.

⁴ [1955] 1 W.L.R. 296; [1955] 1 All E.R. 615.

¹ [1915] 1 K.B. 290.

² Ibid. 295.

“taxing his own solicitor’s bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. This case does not come within either of those two classes. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. The present case falls within this last-mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs.”

My comment on that paragraph is that, if that be the law, the law has got into a deplorable state. There are three different interpretations of the same words “solicitor and client,” apparently; and it seems that, at any rate in cases which fall within what is described as the third class in that division, the successful litigant, instead of getting back what he has had to spend for the purpose of procuring the result, is to get nothing more than party and party costs, with some slight allowance of a minor nature.

The question is whether that third class does in fact apply in the present case. It is apparent that Buckley L.J.’s review is not entirely exhaustive, for in *Goodwin v. Storrar*,³ Denning J. reached the conclusion that, for the purposes of an action by a person claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, there was a fourth interpretation to be given to the words “as between solicitor and client” for the purpose of taxation of costs, and he gave what he considered to be the natural, ordinary meaning to the words, that is, an inquiry as to the costs which the client ought properly to pay to his own solicitor as distinct from

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³ [1947] K.B. 457; 63 T.L.R. 7; [1947] 1 All E.R. 203.

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“taxation between party and party.” It is true that that case before Denning J. concerned Order 22, r. 14, which directed how the costs were to be paid, and Order 65, r. 27 (29) had no application.

In *Reed v. Gray*⁴ Roxburgh J. distinguished *Goodwin v. Storrar*,⁵ although he introduced some qualification on the severity of a strict application of taxation between solicitor and client according to the third rule of Buckley L.J.’s enumeration, by saying that the taxing master ought to be as generous as he could.

When I come to consider whether in the present case the court is restricted by the limiting description by Buckley L.J. in *Giles v. Randall*,⁶ I find that, even within the limits described by Buckley L.J., there are three different scales apparently delineated by the words “as between solicitor and client,” and it may be that I have a class of case which does not come within the classes mentioned by Buckley L.J. at all, so that the words “as between solicitor and client” may have a different meaning from the meaning attributed to these words in the particular order in *Giles v. Randall*.⁶

What is the nature of the present case? It is an application against persons who have been guilty of contempt of court for, it may be, either their committal or attachment, and it is well established by a number of cases to which I have been referred that such a case is in the nature of a criminal information. It is the kind of application of which one has considerable experience in this division, and it has been my experience that costs are not awarded against a respondent to such an application unless the court is of the opinion that the respondent has been guilty of contempt and is thus deserving of punishment, though it may be that he was not deserving of extreme punishment, such as committal to prison. When costs are awarded against such a respondent, as between solicitor and client it is, as Mr. Warren contended, because the court desires to show, first, its disapproval of the conduct of the respondent, and secondly, that the application by the applicant is justified.

It seems to me that an award of costs as between solicitor and client against the respondent in these circumstances is of a punitive nature, and, that being so, it seems to me that the case has nothing whatever to do with the third class of case mentioned by Buckley L.J. in *Giles v. Randall*.⁶ It is a case in which

⁴ [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

⁵ [1947] K.B. 457.

⁶ [1915] 1 K.B. 290.

a penalty has been imposed on the guilty respondent. In my opinion, it is intended that the successful applicant should receive costs substantially on an indemnity basis. It therefore seems to me that, in the present case, the taxing master has gone wrong in principle. So far as I am aware, there has been no decision interpreting an order in a contempt case either one way or the other. It seems to me that, in accordance with the practice in this division, and the intention of an order for payment of costs as between solicitor and client, the corporation should be exonerated from the expenses which it has incurred in having to apply for the committal or attachment of the respondents. The order must be reviewed, and I direct that the costs of the corporation should include the full fees of leading counsel and his junior on the motion before the court.

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Danckwerts J. made the following order: "This court being of opinion that on the taxation of the [corporation's] costs under the order dated March 2, 1956, the plaintiff and the respondents are liable to pay the whole of the [corporation's] costs including the fees to counsel referred to in the objections . . . doth order that it be referred to the taxing master to review his taxation accordingly in respect of the said fees."

K. R. A. H.

The plaintiff and the respondents appealed.

Russell Q.C. and *Helenus Milmo* for the plaintiff and other respondents. Order 65, r. 27 (29), applies to all taxations and cannot be avoided even by express order of the court. Taxation as between solicitor and client is as between party and party but on a more generous scale. It is not equivalent to solicitor and own client. The three well-established meanings of the expression are set out in *Giles v. Randall*¹ and the categories there stated are exhaustive, not merely illustrative. If the person ordered to pay costs is going to pay out of funds belonging wholly to him, the case will come within the exception to sub-rule (29). *Goodwin v. Storrar*² was such a case. The second type of case is where the payment will come out of a fund in which the person paying and others are interested. Thirdly, there is the type of case where the payment is to be made by an adversary or comes

¹ [1915] 1 K.B. 290.

² [1947] K.B. 457; 63 T.L.R. 7;
[1947] 1 All E.R. 203.

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out of a fund in which the person paying has no interest. The application of the rule must be left to the taxing master. Here he applied the correct principle and in substance this is merely an attempt to get the court to review a taxation on the question of quantum, which of course the court has no jurisdiction to do. *Giles v. Randall*³ has not been questioned. It was applied in *Reed v. Gray*,⁴ in which the party ordered to pay costs had made unjustified allegations of fraud. Roxburgh J., reviewing the order made against the plaintiff, said that to hold that an order on a solicitor and client basis was equivalent to solicitor and own client would be sidetracking the statutory rule. [Reference was also made to *Andrews v. Barnes*,⁵ which shows the origin of the jurisdiction to award costs as between solicitor and client, and to *Gibbs v. Gibbs*.⁶]

In substance the judge has said that the statutory rule does not apply to an order made in a case of contempt of court, but he is not entitled to say that. He said that the order may be intended to be punitive but at the time when the order is made the amount of the costs will not be known, so that the court would be imposing a fine of unknown amount. The judge indicated that the basis of the taxation should be to indemnify the applicant for the expense he had incurred, but a complete indemnity would put a weapon in the hands of the applicant, for he might deliberately incur extravagances knowing that he had a good case and that the defendant (who might be a relatively poor man) would probably have to pay for them, without any chance whatever of questioning the reasonableness of the charge.

[LORD EVERSHERD M.R. Unless the order operates as an indemnity, there is a real deterrent to making such applications and bringing contempts to the attention of the court.]

It is possible for the parties to agree to some special basis; the taxation would then not be under the statutory rule at all.

R. O. Wilberforce Q.C. and *Nigel S. Warren* for the corporation. The rule does not define what is meant by solicitor and client; the meaning differs according to the context. Various meanings are set out in Daniell's Chancery Practice, 8th ed., 1914, vol. 2, p. 1078, and in Seton's Judgments and Orders, 7th ed., 1912, vol. 1, p. 244. *Giles v. Randall*⁷ gives a similar statement, and see also *Gibbs v. Gibbs*,⁸ which followed *Giles v.*

³ [1915] 1 K.B. 290.

⁴ [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

⁵ (1888) 39 Ch.D. 133.

⁶ [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

⁷ [1915] 1 K.B. 290.

⁸ [1952] P. 332.

Randall.⁹ All these are, however, only exemplifications of the general rule. The solicitor and client basis does not afford indemnity to the other party. Sub-rule (29) contains two mutually exclusive limbs; the costs must be for the attainment of justice or for the defending of the rights of any party, and then the rule excepts certain things. The present type of case falls within the first limb of the sub-rule, and the applicant should not be put to any expense. He had no option but to bring the matter to the attention of the court, for otherwise he must have been prejudiced in his pending action. To some extent he was fulfilling a public duty, for it is in the interest of the public that justice should not be interfered with. The public nature of this type of application is shown by the fact that motions of this type cannot be brought by individuals but must always be brought by counsel. The motion resembles a criminal information and in the Queen's Bench Division the application could only be made by the Law Officers.

[LORD EVERSHERD M.R. If that was so in the Chancery Division the present problem could not have arisen.]

The costs were given by way of indemnity and in lieu of committing the respondent to prison: see the observation of James L.J. in *Plating Co. v. Farquharson*,¹⁰ which has been applied in practice for many years: see the Annual Practice, 1957, p. 801.

*Giles v. Randall*¹¹ dealt with the ordinary type of civil proceedings but did not lay down a code. The statutory rule is the governing enactment and must be looked at in every case. In this case the taxing master disregarded the public element and wrongly applied the standard applicable to the third group as set out in *Giles v. Randall*,¹¹ but this is a different genus altogether and calls for a different application of the rule for which the court has warrant in the rule itself.

It is a fallacy to say that the taxing master studies the bill and decides which items of expenditure are necessary and which unnecessary. He has first to decide what standard to apply. Then he deals with questions of quantum and it is for the court to say how much more generous he should be in this type of case. Danckwerts J. did not say that the taxation was to be on the solicitor and own client basis. He held that it did not come within any of the categories of *Giles v. Randall*,¹¹ though it was still within the rule, and he said that the taxing master should

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⁹ [1915] 1 K.B. 290.¹¹ [1915] 1 K.B. 290.¹⁰ (1881) 17 Ch.D. 49, 57.

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get nearer to an indemnity, having regard to the nature of the case. He did no more than take to its logical conclusion what Roxburgh J. said in *Reed v. Gray*,¹² which was approved in *Gibbs v. Gibbs*.¹³

It is not suggested that nothing in this type of case should be excluded as being a luxury, but one should start from the view that anything that the applicant did was *prima facie* necessary. In the normal type of litigation the court is concerned to see that a losing party who has been ordered to pay costs is not unfairly penalized, but where the order is intended, as in this case, to be punitive, the rules which are designed primarily for the protection of the party paying costs are applied less strictly. That does not mean that there is no control; the court has ample opportunity to see that no attempt is made to saddle the other party with exorbitant costs and if necessary the court can deal specifically with conspicuous expenses such as, for example, two leaders. Counsel's fees are fixed before litigation and would not be fixed with the primary object of imposing an undue burden on the other side. In this case the corporation had already retained leading counsel in the action and it was reasonable that they should be employed in the motion. If the court decided against the applicant it would put a further weapon in the hands of contemnors.

[LORD EVERSHERD M.R. The dilemma that the court is imposing a penalty of indeterminate amount arises whatever standard is imposed.]

*In re Dargie*¹⁴ fell plainly within the third category of *Giles v. Randall*.¹⁵

Nigel Warren following. In *Reed v. Gray*¹⁶ Roxburgh J. laid down as a matter of principle that the taxing master should take into account the intention to give to the applicant an indemnity for the expense he had incurred, so far as possible, but the master has not got that principle in mind; if he had it would have been made clear in his answers to the objections. He, therefore, went wrong on a matter of principle and the case ought to be remitted to him to make a new taxation.

Russell Q.C. in reply. Every solicitor and client order is subject to taxation and sub-rule (29) applies to each taxation, but the sub-rule contains within itself an exception which deals

¹² [1952] Ch. 337.¹³ [1952] P. 332, 360.¹⁴ [1954] Ch. 16; [1953] 2 All E.R. 577.¹⁵ [1915] 1 K.B. 290.¹⁶ [1952] Ch. 337.

with the first group in *Giles v. Randall*.¹⁷ The explanation of the different categories in that case has nothing whatever to do with the character of the litigation but it stems from the source from which payment comes. It cannot be necessary for the taxing master to set out the principles which he has taken into account in making his taxation; it is for the party objecting to show that he has overlooked something. The master needs to go no further than the court went in *Giles v. Randall*¹⁷ and *Frankenburg v. Famous Lasky Film Service Ltd.*¹⁸

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LORD EVERSHERD M.R. This is an appeal by leave of this court from an interlocutory order made by Danckwerts J. on January 15, 1957, in the action of *Morgan v. Carmarthen Corporation*.¹ In my judgment, though I confess to some feeling of regret, this appeal must be allowed.

[His Lordship stated the facts and continued:] The contempt was not of a character which is perhaps more commonly encountered in the Chancery Division, namely, for disobedience of some order which the court had made, but constituted an act calculated to interfere with the fair and due administration of justice and one designed or likely to embarrass the defendants, the corporation, in the proper defence of the action.

The relevance of this last remark is that the case was very plainly one in which not only were the public concerned because the High Court, as it was alleged, was being contemned, but also the corporation, who were defending themselves in the courts were, as they said, likely to be embarrassed.

[His Lordship stated further facts set out above referring, finally, to the order made by Danckwerts J. on January 15, 1957. He continued:] Danckwerts J. gave reasons for his judgment which we have considered. After referring to certain authorities to which I must later allude, he said²: "What is the nature of the present case? It is an application against persons who have been guilty of contempt of court for, it may be, either their committal or attachment, and it is well established by a number of cases to which I have been referred that such a case is in the nature of a criminal information. It is the kind of application of which one has considerable experience in this division, and it has been my experience that costs are not awarded against a respondent to such an application unless the court is of the opinion that the respondent has been guilty of

¹⁷ [1915] 1 K.B. 290.¹ Ante, p. 461.¹⁸ [1931] 1 Ch. 428; 144 L.T. 534.² Ante, p. 460.

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“ contempt and is thus deserving of punishment, though it may
 “ be that he was not deserving of extreme punishment, such as
 “ committal to prison. When costs are awarded against such a
 “ respondent, as between solicitor and client it is, as Mr. Warren
 “ contended, because the court desires to show, first, its dis-
 “ approval of the conduct of the respondent, and secondly, that
 “ the application by the applicant is justified.” Then the judge
 went on to say that since the award of costs was of a punitive
 nature, and since it was intended that the applicants, in this
 case the corporation, should substantially be indemnified, the
 taxing master had erred in principle in applying to this taxation
 the general strict rule of solicitor and client taxation. The refer-
 ence which Danckwerts J. made to the nature of an application
 for committal for contempt of court was a reference to many
 instances but no doubt included the case to which Mr. Wilber-
 force referred of *Plating Co. v. Farquharson*.³ That was an
 application for contempt of court consisting of an alleged breach
 of an injunction. The matter came before this court and in
 the end the parties who were charged were absolved, the court
 expressing views discouraging motions for committal where there
 really was not a case—the matter being one rather of public
 concern than of private right. As was pointed out by Mr. Wilber-
 force, it has been recently laid down that the public nature of an
 application to commit is such as requires the motion to be moved
 by counsel and not by a litigant in person. But I have referred to
 this case of *Plating Co. v. Farquharson* ³ for a single sentence at
 the end of the report of James L.J.⁴: “ I think that costs as
 “ between solicitor and client may sometimes be given to the
 “ party moving ”—that is the party moving the application for
 committal—“ by way of indemnifying him, instead of committing
 “ the respondent, but I do not think they can be given to the
 “ respondent.” Therefore, I do not doubt that in many cases
 where orders of this kind are made it would be found that
 counsel moving the motion and perhaps the judge alike had it in
 mind that the order would operate substantially by way of
 indemnity. I have no doubt that in many cases in fact it does so.

That brings me to *Giles v. Randall*,⁵ a decision of this court
 in 1915, which, upon my reading of it and its effect, is really
 conclusive of this matter; for, as was there pointed out, the
 effect of the rule (which seems to me inevitably and inescapably
 to apply in this case) may well be to defeat what in some cases

³ (1881) 17 Ch.D. 49.⁴ Ibid. 57.⁵ [1915] 1 K.B. 290.

and perhaps in this case has been at the back of the mind of either the party concerned or of the judge—though in view of another judgment of Vaisey J., to which both counsel have referred, I must not be taken to be saying that the final result here has disappointed Vaisey J. I do not know, and indeed it is not relevant.

*Giles v. Randall*⁵ was a case where an action was brought by the plaintiff for breach of promise of marriage, and the action was settled on the terms that the plaintiff should have judgment for £500 “with costs as between solicitor and client to be taxed” (if necessary). As the members of this court, Buckley and Pickford L.JJ., observed, it was likely enough, to say the least of it, that when that settlement was made the plaintiff, at any rate, and her advisers, supposed and intended that she should get £500 clear after her costs had been paid. As was pointed out, the effect of the rule as interpreted by them, and as we must interpret it, may well be disappointing to people who have an intention of that kind.

Before I refer to what Buckley and Pickford L.JJ. said, it is right I should now make some reference to the rules. It has been explained that, except in special cases, of which rule 22 (14A) is an example, the general provisions for taxation contained in Order 65 do not refer to “solicitor and client taxation” as distinct from “party and party taxation.” As I follow it, the distinction is one which has grown up over a long period of time as a practical distinction in taxation of costs, and that distinction has been picked up and adopted since not only in the rules of court, of which I gave an example a moment ago, but has also been applied more recently in regard to legal-aid legislation. But in this case we are not concerned with any special statutory provision of that kind. For us the application of Order 65 cannot be in doubt. [His Lordship read rule 27 and sub-rule (29) as set out above. He continued:] That rule took its present form in the year 1902: and the effect of it seems to me quite clearly to be that (save in the excepted case) a taxing master’s duty is to allow only such costs as appear to him “necessary” or proper for the attainment of justice, and, in doing so, to disallow such costs as he attributes to over-caution and the like or regards as otherwise unusual.

I will now return to the case of *Giles v. Randall*,⁶ observing that the phrase which I have read “but save as against the party

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⁵ [1915] 1 K.B. 290.

⁶ Ibid.

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“ who incurred the same ” is an exception to the general provision of the rule which relates to the case of a solicitor charging his own client. In *Giles v. Randall*⁶ the facts were as I have stated them. What had happened was that certain expenses of the plaintiff's had been disallowed by the taxing master, so that the plaintiff discovered that she had not got by an appreciable margin her clear £500. The facts of the long-established practice appear where the master in his answers to objections said⁷:

“ ‘ It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party ’ ”: that is to say, belonging to the party concerned and where therefore the effect in practice is exactly the same as that of a solicitor charging his own client. I have already said that that class of case is the subject of the exception introduced by the relevant words in sub-rule (29): “ ‘ No. 2. Where the costs are payable out of a general or common fund. No. 3. Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another. ’ ” There is no doubt that in *Giles v. Randall*⁸ the case was within category No. 3. There is also no question that in this case the costs are likewise payable by one party to the other. Buckley L.J. said⁹: “ There are three modes of taxation as between solicitor and client. ” Then he referred to them and I need not read that again. He continued: “ The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the rule committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect

⁶ [1915] 1 K.B. 290.⁷ Ibid. 291.⁸ [1915] 1 K.B. 290.⁹ Ibid. 295.

" of costs." He accordingly held that the taxing master was bound to tax on the basis that it was a class 3 case and he came to the conclusion that the taxing master's discretion could not be properly interfered with. Pickford L.J. gave judgment to the same effect, equally drawing attention to the effect of the long-established practice in diminishing the effect of solicitor and client taxation and distinguishing it from solicitor and own client taxation. He referred to a passage in Daniell's Chancery Practice, 8th ed., 1914, vol. 2, p. 1078, which corresponds with a passage in Seton's Judgments and Orders, 7th ed., 1912, vol. 1, p. 244, to which Mr. Wilberforce referred. The passage in Daniell's Chancery Practice quoted by Pickford L.J. is: "a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party entitled to costs has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to such party himself." Thus the classes are in the converse order. Then continuing his quotation from Daniell: "These distinctions however are not made in the order directing the taxation, but only when the order is acted upon by the taxing officer," and so on. Then the lord justice indicated that possibly the court might, if it desired to produce that result, give a direction in any order as to taxation that certain matters, such as counsel's fees, for example, should not be the subject of any taxation at all. I think, as at present advised, that it is doubtful whether the court can competently give a direction of that sort in the absence of agreement, and also whether the court could order a taxation inter partes, again in the absence of agreement, as between solicitor and own client. It is not necessary for the purposes of this case to express any final view on those matters and I do not do so.

I come back to the regret which I expressed earlier, because (whether this is such a case or no) I am quite sure from my own experience that there are cases, contempt cases, where the court would desire to give an applicant something very like an indemnity.

In this case the applicants, that is the defendants, are the mayor, aldermen and burgesses of the county of the borough of Carmarthen. They have a duty to their own rate-paying citizens, but they are, as I think, in a somewhat happier position as regards costs than an ordinary private litigant might be. It would, of course, be a wrong thing in the public interest if an

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individual party were deterred from bringing a real case of contempt to the notice of the court through the fear that he would have to pay out of his own pocket a substantial or a not negligible sum for costs in performing what was, in effect, a public duty or, at least in one aspect of it, a public duty. I venture, therefore, to echo what was said by Buckley L.J. as to the possibility that this matter and its effect in some cases might be thought proper for consideration by the rule committee.

But, whatever the future may have in store, the question we have in this case to determine is whether Danckwerts J. was entitled to hold, as he did, that the effect of this order was to require the taxing master, as a matter of principle, not to give the full indemnity as would arise in a taxation between a solicitor and his own client, but at least to give a substantial indemnity: in other words, that the taxing master erred in treating this case as one falling within the third class above mentioned. It will be remembered that when I read the taxing master's answer he stated that the case fell within the third class, being the strictest of the three bases of solicitor and client taxation. We are not here concerned with the question whether the taxing master rightly exercised his discretion as to amount if the case were of the nature and kind which he, the taxing master, thought it was. We are asked, as a matter of principle, to say that these contempt cases should be regarded as in a category by themselves (outside the general purview of the order) for the reasons intimated by the judge, videlicet first that the order was intended to be punitive and, second, that it was intended to provide substantially an indemnity to the applicant.

I have already stated at the beginning of my judgment that I have been unable to agree with the view of the judge. It seems to me that there is no basis upon which we could so hold, and indeed that such a view would be in conflict with what was laid down by this court in *Giles v. Randall*.¹⁰

Reference was made to the judgment of Roxburgh J. in *Reed v. Gray*.¹¹ That was a different case. It was not a contempt case at all. It was a case in which the judge thought that a party who had made (and persisted too long in) a charge of fraud should be ordered to pay solicitor and client costs. The judge, having referred to *Giles v. Randall*,¹² said¹³: "That case, in my

¹⁰ [1915] 1 K.B. 290.¹² [1915] 1 K.B. 290.¹¹ [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.¹³ [1952] Ch. 337, 345.

“ judgment, decided one thing quite clearly, namely, that the
 “ latter part of the sub-rule applied to a solicitor and client
 “ taxation, with the inevitable corollary that a solicitor and client
 “ taxation cannot be made identical with a solicitor and own
 “ client taxation.” With that I entirely agree. I appreciate, of
 course, that Mr. Wilberforce has not said that the taxation in
 this case must be treated as identical with a solicitor and own
 client taxation. He has said, for the reasons he indicated, that
 it should be regarded as being something very like it, and, indeed,
 he referred to a later passage in Roxburgh J.’s judgment¹⁴ as an
 intimation that, where the intention of the court in making such
 an order could be discerned as meaning something near to an
 indemnity, then, as a matter of principle, the taxing master
 must so approach the taxation. I doubt whether Roxburgh J.
 intended to lay down any such general rule; but if he did I
 am afraid I could not go with him, because I do not see any
 basis which would justify us in giving to a solicitor and client
 taxation, not being of the two special kinds which are called
 classes 1 and 2, any other meaning than that which Parliament
 through the rule committee by Order 65, r. 27 (29), has laid down.
 That sub-rule requires that on every taxation certain principles
 shall be followed. It is now established that on a solicitor and
 client taxation the application of those principles is to be made
 with greater generosity than on a party and party taxation. So
 much was laid down in *Giles v. Randall*¹⁵ and has since been
 followed. It is still a matter of degree and discretion. But, as
 Mr. Russell pointed out in his reply, the claim to make these
 contempt orders a class by themselves for this purpose is a
 claim which does not rest upon any basis such as that which
 distinguishes classes 1 and 2 from class 3 referred to in *Giles v.*
Randall,¹⁵ namely, because there is some fund out of which the
 costs will be paid; but is founded merely on the fact that the
 order is of a particular kind in which certain assumptions as to
 the intention of the court are made. As regards those assump-
 tions, I think, with the division of this court which gave leave to
 appeal, that it may be doubtful whether one can attribute to a
 court a desire to impose a punishment, that is to say, a penalty,
 when the order imposing the penalty would produce a result
 unknown and unquantified by the court. Again I am not to be
 taken as saying that, in making these orders, as James L.J. said
 a quarter of a century ago, the court may not well be expressing

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its disapproval of the conduct of the party charged. But if the court desires to impose a particular penalty, then it may well be that in future such an order would have to be differently expressed. But, as regards indemnity, the difficulty with which I think Mr. Wilberforce is faced and which he cannot surmount is that this order on the face of it is an order for taxation between solicitor and client and that the order must be treated as being like other orders made *inter partes* for taxation of costs between solicitor and client, namely, one that is intended to be governed by the general rule. There is nothing in the order from first to last to qualify that result.

I revert, finally, to the language of the taxing master which I have already read in his answers to the defendants' objections. I think there is no doubt that since this was a contempt case the taxing master would have to consider questions of over-caution, exceptional fees and the like in relation to that important fact; but I can see no ground for saying that in the answers which we have before us he did not do so. He says that the order entitled the applicants—that is, the corporation—in effect, to party and party costs on more generous lines and after careful consideration of, and giving due weight to, the importance and nature of the case. In my judgment, the taxing master was properly formulating for himself and so far as I can see properly applying the principles which should affect him in exercising his discretion.

The result, therefore, is that with such regret as I earlier indicated, I have come to the conclusion that we cannot do other than allow this appeal and, accordingly, set aside the order of Danckwerts J.

HODSON L.J. I agree. I share the regret expressed by the Master of the Rolls that it is necessary to allow this appeal, because one naturally feels that if parties bring to the attention of the court a contempt which has been committed it is unfortunate that they should have to do that, partly, at any rate, at their own expense.

The judge, in dealing with the matter, condemned the party in contempt in costs as between solicitor and client, going as far as he could towards indemnifying the successful party and going as far as he could towards punishing the unsuccessful party in the absence of the infliction of a fine.

But the order which he made has to be dealt with in accordance with the R.S.C., Ord. 65, r. 27 (29), which has been

considered by this court in *Giles v. Randall*.¹⁶ To my mind, it is impossible to treat the taxation as a matter of principle in a way other than the way in which the master treated it. It is clear from his answers to the objections which the corporation raised that he had in mind the language of Buckley L.J. in *Giles v. Randall*,¹⁷ and he pointed out that the order entitled the corporation, in effect, to party and party costs, but on more generous lines. That rule has to be acted upon, bearing in mind that it is the source of the payment and not the kind of litigation which is relevant in taxation between adversaries. There was no misdirection and no error in point of principle into which the master fell.

The contention has been put forward in this court that, in contempt proceedings, although the taxation should not be on the basis of solicitor and own client, there should be some superior class of taxation as between solicitor and client. There is no warrant, in my judgment, for such a contention, certainly not in the language of the rule. No doubt, the importance of the litigation is a matter to be considered, but there is no warrant in the language of the rule for putting contempt proceedings in a class by themselves so as to involve the master in the intellectual process of adopting a more generous scale in such proceedings than in other proceedings where the taxation is upon the solicitor and client basis.

The judgment of Buckley L.J. in *Giles v. Randall*,¹⁷ in my opinion, is exhaustive. If it be desired to correct the situation as it exists at present under the rules, that is a matter for the rule committee. Buckley L.J. pointed out as long ago as 1914 that it was a little unfortunate that there had grown up a difference between the phrases "solicitor and own client costs" and "solicitor and client costs," which a successful litigant is often surprised to find existing. There has been no correction in that matter by the rule committee since that time, but, on the matter which arises in this case of the taxation of costs in contempt proceedings, I agree with the Master of the Rolls that it might well be the subject-matter of separate consideration by the rule committee.

I agree that the appeal should be allowed.

ROMER L.J. I also agree. Despite the attractive way in which Mr. Wilberforce and Mr. Warren presented their argument, I have been quite unable to escape from the view that in reality

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¹⁶ [1915] 1 K.B. 290.¹⁷ Ibid. 295.

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the summons which the corporation issued to review the taxing master's certificate was an attempt to persuade the judge to interfere with the discretion of the taxing master on a question of quantum, which, of course, the court has no jurisdiction to do.

Mr. Wilberforce attempted, as he was bound to do if he was to succeed, to base the matter on a question of principle. The principle, in brief, for which he contended is this: that, whatever may be the accepted meaning of an order for taxation of costs as between solicitor and client in ordinary litigation, it has or may have a special meaning attributed to it when such a taxation is directed in an order made on an application founded upon contempt; and the fact that it is an order made on an application founded on contempt should in itself result in the taxing master attributing a special significance to the expression which it does not bear in any other form of order. The significance which it is suggested the taxing master should attach to the phrase is that he should tax the costs not wholly on an indemnity basis in favour of the successful party to a contempt application but practically on an indemnity basis, subject to the power of the taxing master to cut down or reduce some obviously exorbitant charge. It may very well be that such a principle would be a highly desirable one to adopt, but the fact remains that it has not been enshrined in our procedure. I say it might be a highly desirable one to adopt because anything that is calculated to deter a person from bringing to the attention of the court the fact that there has been a contempt is to be deplored. If a person is called upon to put his hand to some extent into his own pocket when bringing contempt to the notice of the court he will be deterred from doing so. But, be that as it may, it is clear to me that there is no such principle incorporated in our practice. It seems to me, indeed, very difficult to reconcile such a principle with the express language of R.S.C., Ord. 65, r. 27 (29).

Accordingly, on that short ground that the principle is not a principle which in fact exists and that in substance this is really an appeal on a question of quantum, I, with the same regret as my brethren have expressed, must agree to the appeal being allowed.

Appeal allowed.

Solicitors: *Rhys Roberts & Co. for W. Davies & Jenkins, Llanelly; Sweystone, Walsh & Son; Boxall & Boxall.*

E. D.

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[1956 B. 1495.]

1957
May 28, 29;
June 6.

Harman J.

Land Registration—Limitation of action—Registered land—Adverse possession—Land sold under oral contract—Purchaser in possession—No conveyance to purchaser—Caution not registered—Second sale of land—Registration of title by second purchaser—Rights of first purchaser—Whether entitled to claim by adverse possession—Whether interest of first purchaser overriding interest—Necessity for caution—Land Registration Act, 1925 (15 & 16 Geo. 5, c. 21), ss. 3 (xvi), 59 (1) (6), 69 (1), 70 (1) (f) (g), 75—Land Charges Act, 1925 (15 & 16 Geo. 5, c. 22), s. 23—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 7 (3) (5), 10 (1).

The plaintiff and defendant owned and occupied adjoining dwelling-houses purchased from the same company. On April 6, 1936, the plaintiff contracted orally with the company to purchase a small piece of land at the rear of both properties for £7. He paid £2 and went into possession of the land; the property was registered land but no caution was put on the register in respect of the oral contract. By 1937 he had paid all the purchase-money.

In 1955 the defendant purchased from the liquidator of the company (which was then in liquidation) the same piece of land for £5, the liquidator only covenanting for title as trustee. On April 13, 1956, the defendant registered his title in the proprietorship register of the Land Registry. He then claimed possession of the land from the plaintiff. The plaintiff by this action asked for a declaration that he was the beneficial owner of the land, and for rectification of the register on the ground, *inter alia*, that he had an overriding interest in the land, having rights “acquired . . . under the Limitation Acts” and of a “person in actual occupation of the land” within the meaning respectively of paragraphs (f) and (g) of section 70 (1) of the Land Registration Act, 1925:—

Held, (1) that the defendant as proprietor of registered land was by virtue of section 69 seised of an estate in fee simple in the land, subject however to overriding interests.

(2) That the vendor company became trustee for the plaintiff, but its estate was extinguished under section 7 (3) of the Limitation Act, 1939, since no beneficiary had any right to bring an action for the recovery of the land, and the period of limitation could therefore run in favour of the plaintiff.

(3) That although the company as trustee could not have succeeded in an action for the recovery of the land (because it would have been met with the plea that the beneficial interest was vested in the plaintiff), the question could not turn on whether or not that action could have succeeded.

In re Cussons (1904) 73 L.J.Ch. 296 applied.

(4) That since the proviso to section 7 of the Real Property Limitation Act, 1833, that a cestui que trust could not acquire a

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title against the trustee was omitted from the corresponding section, section 9 (1), of the Limitation Act, 1939, time could therefore run in favour of the plaintiff, for whom the defendant was now a bare trustee.

(5) That the oral contract of 1936 was not void as against the defendant because of the plaintiff's failure to put a caution on the register, since it was an overriding interest which did not require to be protected by a caution; and the plaintiff was entitled to the relief claimed.

ACTION.

In January, 1932, Surbiton (Hook) Estates Co. Ltd. became registered proprietor of certain land at Surbiton which it proceeded to develop by building houses and selling them. The plaintiff bought one of these houses, and was registered on July 10, 1933, as the proprietor of a strip of land called 6, Priory Road, bounded on the north by Priory Road, and on the south-west by Hunters Road. On September 14, 1935, the defendant was registered as the proprietor of No. 8, Priory Road, adjoining the plaintiff's property on the east side. At the back of both of these properties, but much more at the back of the defendant's than the plaintiff's, was an irregular four-sided piece of land (hereinafter referred to as "the disputed land") which was conveyed neither to the plaintiff nor to the defendant.

A document, dated April 6, 1936, was produced as evidence of an oral contract under which the plaintiff agreed to purchase the disputed land from the company, being a receipt for the sum of £2 as "deposit on freehold plot of land at rear of 6, Priory Road, with a frontage to Grange Road, Surbiton. Purchase price £7 including fence; balance to be paid £5." The property was registered land but no caution was registered in the Land Registry in respect of this contract.

Pursuant to that oral agreement the plaintiff removed what was then a hedge between his land and the disputed land and went into occupation of it. By the middle of 1937 he had by instalments paid the remaining £5 of the purchase price, but no conveyance of the land was executed in his favour. From then onwards he remained in occupation of the disputed land, using it for various purposes, as a stand for his caravan, as a chicken-run, and as a place for a motor-car. He was given permission to have a run-in over the kerb of Hunters Road, and he put in a double-sided gate. There was a hedge between the defendant's property and the disputed land—that was on the southern

boundary of the defendant's land—until 1954, when the defendant removed the hedge, but there still remained a wire fence which kept in the plaintiff's chickens.

On March 3, 1955, the development company went into voluntary liquidation. In the autumn of that year the defendant decided to acquire the disputed land for himself. He did not inform the plaintiff of his intention, but he applied to the liquidator and was told that the vendors would sell such rights as they had over the plot. The defendant offered £5, and that sum was paid. It was also agreed that the vendors (namely, the company by its liquidator) would only covenant for title as trustee. The company executed a transfer in the defendant's favour on April 7, 1956, and it was not till then that the defendant informed the plaintiff of what he had done; he told him on April 11, 1956, and asked him to give up possession. On April 13, 1956, the defendant became the registered proprietor of the disputed land.

On May 9, 1956, the plaintiff registered a caution in respect of the disputed land, but by that time it was too late to have any effect.

The plaintiff, who issued the writ in this action on May 9, 1956, asked for a declaration that he was beneficially entitled to the disputed land in fee simple; rectification of the register at the Land Registry by the substitution of his name for the defendant's name in the proprietorship register thereof; alternatively, an order on the defendant to execute a transfer of the disputed land in favour of the plaintiff; an injunction restraining the defendant from trespassing on the disputed land and damages for trespass.

The defendant denied that he had trespassed on the disputed land and contended that he was, and at all times since April 13, 1956, had been, lawfully entitled to possession and occupation of the disputed land. He denied that he held the legal estate in the disputed land in trust for the plaintiff, and in particular he denied: (a) that the oral agreement between the plaintiff and the estate company was binding on him (not having been registered as a Land Charge Class C (iv)); (b) that the plaintiff, having been prior to April 13, 1956, in lawful possession of the disputed land, had acquired any right or title thereto under and by virtue of the Limitation Act, 1939,¹ or (c) that the plaintiff was entitled to an

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¹ Limitation Act, 1939, s. 7: "has expired for the bringing of an
 "(3) Where any land is held upon "action to recover the land by the
 "trust including a trust for sale, and "trustees, the estate of the trustees
 "the period prescribed by this Act "shall not be extinguished if and so

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overriding interest therein whether under section 70 of the Land Registration Act, 1925,² or otherwise. He counterclaimed for an order to restrain the plaintiff from trespassing on the disputed land.

"long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustees shall be extinguished. (5) Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession to any person in whom the land is vested as . . . trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale."

S. 10: "(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession') and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land."

² Land Registration Act, 1925, s. 3 (xvi): "'Overriding interests' mean all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect . . ."

S. 59: "(1) A writ, order, deed of arrangement, pending action, or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925, shall, where the

"land affected . . . is registered, be protected only by lodging . . . a caution against dealings with the land . . . (6) Subject to the provisions of this Act relating to fraud . . . a purchaser acquiring title under a registered disposition, shall not be concerned with any pending action, writ, order, deed of arrangement, or other document, matter, or claim (not being an overriding interest) which is not protected by a caution or other entry on the register, whether he has or has not notice thereof, express, implied, or constructive."

S. 69: "(1) The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession . . . but subject to the overriding interests, if any . . . which has priority to the registered estate."

S. 70: "(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act . . . (f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts; (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."

S. 75: "(1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate

R. S. Lazarus for the plaintiff. The land has at all material times been registered land, so that the Land Charges Act, 1925, has never been applicable to the oral contract made by the plaintiff in 1936: see section 23 of the Act. The plaintiff claims to have an overriding interest under one or both of paragraphs (f) and (g) of section 70 (1) of the Land Registration Act, 1925. Overriding interests are defined in section 3 of the Land Registration Act, 1925, and section 20 of the same Act provides that the transferee of registered land takes subject to them.

As to the claim under section 70 (1) (f), the question arises whether the plaintiff could acquire a title under the Limitation Act, 1939, against the development company, Surbiton (Hook) Estate Co. Ltd. Before the coming into operation of the Limitation Act, 1939, the proviso to section 7 of the Real Property Limitation Act, 1833, prevented a beneficiary from acquiring a title as against his own trustee, possibly even if the trustee were a bare trustee. But the proviso was not re-enacted in section 9 (1) of the Act of 1939 and, whatever may have been the position previously, it is submitted that a beneficiary may now acquire a title as against his own trustee where the latter is a bare trustee: see Limitation Act, 1939, ss. 7 and 10 (1). In the present case the development company was a bare trustee for the plaintiff after May 22, 1937, when the plaintiff completed payment of the purchase price for the land. Accordingly, by the combined operation of sections 4 and 16 of the Limitation Act, 1939, and section 75 of the Land Registration Act, 1925, the development company came to hold the registered title to the land in trust for the plaintiff. The plaintiff's rights were rights acquired under the Limitation Acts within the meaning of the Land Registration Act, 1925, s. 70 (1) (f), and the defendant took his registered title subject to them: Land Registration Act, 1925, s. 20.

As to the claim under section 70 (1) (g), at the time when the defendant became registered as the proprietor of the land the plaintiff was in actual occupation within the meaning of this paragraph, and that circumstance is conclusive of the case. A similar claim to an overriding interest arising out of actual occupation under an oral agreement was upheld in *Woolwich Equitable*

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“ of the person registered as proprietor
 “ would be extinguished, such estate
 “ shall not be extinguished but shall
 “ be deemed to be held by the proprie-
 “ tor for the time being in trust for
 “ the person who, by virtue of the

“ said Acts, has acquired title against
 “ any proprietor, but without prejudice
 “ to the estates and interests of any
 “ other person interested in the land
 “ whose estate or interest is not
 “ extinguished by those Acts.”

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Building Society v. Marshall.³ See also *Mornington Permanent Building Society v. Kenway*⁴ and the dictum of Jenkins L.J. in *City Permanent Building Society v. Miller*.⁵

Stewart Newcombe for the defendant. The plaintiff's omission to protect his interest by registration entitles the defendant to take free of that interest. Under section 20 of the Land Registration Act, 1925, a disposition of registered land shall be subject only to entries on the register and overriding interests. The plaintiff's interest, which is an estate contract, was not on the register, although it should have been, and the defendant is not affected by it: section 49 (1) (c). Overriding interests referred to in section 20 (1) (b) are alternative to those interests which have to be protected by registration and do not mean interests which a person has failed to register.

The plaintiff cannot excuse his lack of registration by pleading the fact that he was in occupation. If he was in adverse possession, it is conceded that that would be an end of the matter, but he never was in adverse possession. He cannot rely on section 70 (1) (g) as a means of escape from the consequence of his neglect to put a caution on the register, because his right arises under an agreement of which there ought to be an entry on the register: *Coventry Permanent Economic Building Society v. Jones*.⁶

The mere fact that the plaintiff was in equity absolute owner and in possession does not avail against the owner of the legal estate. Assuming that the plaintiff could establish the rights which he claims under the oral contract, they would be void against the defendant, who has the legal estate, because those rights are not registered. The only protection which the plaintiff can claim is that he is in occupation; but the Limitation Act, 1939, applies to registered land in a special way, and the rights in respect of overriding interests given to persons in actual possession by section 70 (1) (g) do not apply to any right which can be protected by registration; paragraph (g) only applies to rights which are not capable of protection by registration, and any other construction would appear to make the whole system of the Act nugatory. As to the plaintiff's claim under the Limitation Act, the period of limitation can only run in favour of a person in adverse possession: section 10 of the Limitation Act, 1939. The plaintiff's possession was not adverse, as it was based on his

³ [1952] Ch. 1; [1951] 2 T.L.R. 783; [1951] 2 All E.R. 769.

⁴ [1953] Ch. 382; [1953] 1 All E.R. 951.

⁵ [1952] Ch. 840, 854; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

⁶ [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901.

lawful entry under the oral contract. Possession is never adverse if it can be referred to a lawful title: *Thomas v. Thomas*,⁷ the principle of which was approved in *Corea v. Appuhamy*.⁸ That is strong authority to the effect that where one enters lawfully, a claim by adverse possession cannot be set up.

[HARMAN J. You are worse off when you enter lawfully.]

Yes, often, the case is by no means as startling as it sounds, because one has a comparable situation in detinue. Only adverse possession is relevant for the Limitation Act, and it is perfectly clear that the plaintiff entered lawfully into possession because he says so, and any claim based on lawful possession must fail if expressed as a claim by adverse possession. He cannot therefore claim an overriding interest under paragraph (f) of section 70 (1).

Lazarus in reply. Section 7 (5) of the Limitation Act, 1939, does not state positively that a beneficiary solely and absolutely entitled is able to acquire a possessory title against the trustee, but that proposition is implied in the subsection.

[HARMAN J. But that is settled land or land held on trust for sale.]

It is inconceivable that the legislature intended that a beneficiary under a settlement or trust for sale should be in a better position in this respect than a beneficiary under an implied trust.

When the plaintiff first went into possession in the present case he was not solely and absolutely entitled, but he became so when he completed payment of the purchase money. Thereafter the development company would have been obliged to convey the legal estate to him on demand (*Shaw v. Foster*⁹) and in equity could not evict him. The character of the plaintiff's possession changed when he completed payment. The Limitation Act, 1939, itself contemplates the possibility of such a change: see section 7 (5) (a beneficiary becoming solely and absolutely entitled), and section 9 (1) (determination of a tenancy at will). Under the old law it was always recognized that the character of possession could change from permissive to adverse. Examples can be found in the bailiff cases, where a person took possession of an infant's land and remained in possession after the infant attained his majority: see *Preston & Newsom on Limitation of Actions*, 3rd ed., p. 91. In *Thomas v. Thomas*¹⁰ the claim that the character of the possession had changed failed because the equity of the case was against it. It is conceded that the onus

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⁷ (1855) 2 K. & J. 79.

⁸ [1912] A.C. 230.

⁹ (1872) L.R. 5 H.L. 321.

¹⁰ 2 K. & J. 79.

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of establishing a change in the character of possession is on the party asserting it: *Tinker v. Rodwell*.¹¹

[HARMAN J. *In re Cussons*¹² is some authority that the statute can run against a bare trustee when he allows the cestui que trust to remain in possession.]

That case was criticized on the ground that it did not take into account the proviso to section 7 of the Real Property Limitation Act, 1833. But a somewhat similar result was reached in *Sands to Thompson*.¹³ There is difficulty in reconciling the cases decided under the old law: *Drummond v. Sant*¹⁴; *Warren v. Murray*.¹⁵ The purpose of the proviso to section 7 of the Act of 1833 was to prevent one beneficiary ousting another. But it has not been re-enacted and that purpose is achieved by other means. Accordingly, it is submitted that there is now nothing to prevent a beneficiary solely and absolutely entitled from ousting the title of his trustee. Section 10 of the Act of 1939 is of little assistance because it does not define in whose favour time can run. But the test whether or not time can run against the trustee is not the existence in the trustee of an unqualified right to recover possession by proceedings in the courts: *Moses v. Lovegrove*.¹⁶ The test is his right to recover possession at law. The plaintiff's submissions on this point are supported by statements in the text-books: see Preston & Newsom on Limitation of Actions, 3rd ed., pp. 147-148, and Underhill on Trusts and Trustees, 10th ed., p. 232.

As to the point under section 70 (1) (g) of the Land Registration Act, 1925, *Coventry Permanent Economic Building Society v. Jones*¹⁷ was wholly concerned with two sections of the Land Charges Act, 1925, and is irrelevant to this case. Admittedly the plaintiff's contract could have been protected by a notice or caution on the register. But in section 3 (xvi) of the Land Registration Act, 1925, "overriding interests" are defined as certain matters "not entered on the register." The Act nowhere says that "overriding interests" are confined to matters not capable of entry on the register, and the term includes both matters capable and matters incapable of such entry.

Section 59 (1) must be read in conjunction with section 59 (6), which expressly saves overriding interests. Section 70 (1) (g)

¹¹ (1893) 69 L.T. 591.

¹² (1904) 73 L.J.Ch. 296.

¹³ (1883) 22 Ch.D. 614.

¹⁴ (1871) L.R. 6 Q.B. 763.

¹⁵ [1894] 2 Q.B. 648; 10 T.L.R. 573.

¹⁶ [1952] 2 Q.B. 533; [1952] 1 T.L.R. 1324; [1952] 1 All E.R. 1279.

¹⁷ [1951] W.N. 218.

is plainly a reference to the principle of *Hunt v. Luck*,¹⁸ which is a valuable principle and ought to be preserved. If the paragraph were construed in accordance with the defendant's submissions it would be so restricted as to be rendered almost valueless. It should be construed without any gloss being placed on the words used. To reject the plaintiff's submissions on this point would be inconsistent with *Woolwich Equitable Building Society v. Marshall*¹⁹ and *Mornington Permanent Building Society v. Kenway*.²⁰

Newcombe in reply on the cases. The cases before 1939 are not now relevant to claims under the Limitation Act, 1939. It is simply a question of the construction of that Act: can the limitation period run in favour of a person absolutely entitled in equity? The limitation period can only run where there is adverse possession by the person claiming a title under the Act, and there can be no adverse possession by the person lawfully in possession. It is beside the point to say that the character of the possession can change. If anything, the plaintiff's possession became more lawful, as he had paid off all the instalments of the purchase money. Adverse possession is constituted by possession against the person who might bring an action for the recovery of the land. But the trustee could not go into a court and ask for an order to turn out the beneficiary, and there was no possible action for the recovery of the land which the defendant could bring and therefore no adverse possession against him. The expression time "can run" postulates that there is a person who can make an effective claim against the person in possession, and where there is no one who can make that claim, there is no adverse possession for the purposes of the Act.

Cur. adv. vult.

June 6. *HARMAN J.*, having stated the facts, read the following judgment: The result of the transactions which I have described is, admittedly, that the defendant is seised of the property for an estate in fee simple in possession. This is so even if the plaintiff has acquired by possession a right to the property under the Limitation Act, 1939; for, this being registered land, the defendant gets the title which the register gives him, even though the title of the transferor would, in the case of unregistered

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¹⁸ [1901] 1 Ch. 45; 17 T.L.R. 3;
[1902] 1 Ch. 428; 18 T.L.R. 265
(C.A.).

¹⁹ [1952] Ch. 1.
²⁰ [1953] Ch. 382.

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land, have been extinguished by virtue of section 16 of the Limitation Act, 1939. It is provided by section 75 of the Land Registration Act, 1925, that the registered proprietor's title shall not be extinguished after time has run, but shall be held on trust for the person who, if the land were unregistered, would have acquired a title by adverse possession. It follows (and section 69 of the Land Registration Act so enacts) that the defendant, as proprietor, is seised for an estate in fee simple in possession, subject, however, to what is called any "overriding interest." These are defined by section 3 (xvi) of the Act. Liability to them is particularized in section 70 of the Act where a number are set out, of which those enumerated in paragraphs (f) and (g) of subsection (1) are relevant: "(f) Subject to the provisions of this "Act, rights acquired or in course of being acquired under the "Limitation Acts; (g) The rights of every person in actual "occupation of the land or in receipt of the rents and profits "thereof, save where inquiry is made of such person and the "rights are not disclosed."

It is the plaintiff's claim that he is entitled to an overriding interest under one or both of the subsections I have read. As to the former, his claim is that when he entered into possession in 1936 under the contract to buy made in that year, that, no doubt, was by the permission of the vendor, who retained a lien on the property for the purchase money. By 1937, however, the plaintiff had paid off by instalments all the purchase money and the lien disappeared and he became, he says, the sole beneficial owner. The vendor retained the legal estate which entitled him *prima facie* to resume possession, but as he did not exercise that right for 12 years, the plaintiff says it was extinguished and at the end of that time he became a trustee of the legal estate for the purchaser (that is to say, the plaintiff) as above described. If that be right, the defendant is in no better position; but his answer is that the plaintiff's possession did not ripen into ownership, because it was not "adverse," on the ground that possession can only be adverse if it be not referable to a lawful right. For this proposition, the defendant referred me to *Thomas v. Thomas*,¹ as approved by *Corea v. Appuhamy*.²

As to this, I am of opinion that so far the plaintiff's claim is right. No doubt possession, when originally taken, may be referred to the vendor's leave and licence, but this position is altered when the vendor's lien disappeared. The defendant,

¹ (1855) 2 K. & J. 79.

² [1912] A.C. 230.

however, further points out that by section 10 of the Limitation Act, 1939, this is enacted: "No right of action to recover land " shall be deemed to accrue unless the land is in the possession " of some person in whose favour the period of limitation can run " (hereafter in this section referred to as 'adverse possession')." Can it therefore be said that the plaintiff is a person in whose favour the period of limitation "can run"? For the answer to this, reference must be made to section 7 (3) of the Limitation Act.

[His Lordship read section 7 (3) of the Limitation Act, 1939, and continued:] In this case the vendor became a trustee of the legal estate in 1936, and from 1937 a bare trustee, and no beneficiary had any right of action to recover. It seems to me to follow that from that date the period of limitation could and therefore did run in favour of the beneficial owner and that thus (but for the provisions as to registered land) the trustee's title would have been extinguished in 1949.

It was argued that from 1937 the trustee himself could never have brought an effective action to recover the land, because he would have been met by the plea that the whole beneficial interest was vested in the purchaser; but, in my judgment, the question cannot turn on whether the action would have succeeded or no: see *In re Cussons*³ where Kekewich J. said⁴: "Here " twelve years have elapsed since the incorporated company have " been in possession, and the trustees have not interfered as " trustees. This seems to me to be a new application of the " Act, that a person who is a bare trustee without duties may " lose his trust estate at the end of twelve years if he does not " interfere. But I do not see why he does not come within the " section, and I think that this contention on behalf of the " vendors is right. One can see cases where a trustee might " keep alive the right that he has by bringing an action of eject- " ment; but if he allows the cestui que trust to remain in posses- " sion, the statute must run against him, and by virtue of the " Act of 1874 and the earlier Act the title is gone."

Before I leave this part of the case I ought perhaps to refer to the change in the law brought about by the Limitation Act, 1939, in the relations of trustee and cestui que trust. Before 1939, the cestui que trust, having regard to a proviso attached to section 7 of the Real Property Limitation Act, 1833, could not

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³ (1904) 73 L.J.Ch. 296.⁴ Ibid. 298.

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acquire a title against the trustee. That proviso is omitted from the corresponding section, section 9 (1) of the Act of 1939, with the result that time can now run in favour of the cestui que trust. I find myself in agreement on this point with the statement by the editors of *Underhill on Trusts*, 10th ed., p. 232: "it is apprehended that any other trustee, including a constructive trustee" (as, for example, a vendor under an uncompleted contract), is "liable to be divested of the legal estate by possession of a person entitled in equity in exactly the same way as if the latter were "a stranger." No very precise authority is given for that proposition, but I think it is right. It is fair to say that subsections (3) and (5) of section 7 of the Act of 1939 are far from clear, and this result at the best is only implicit in them.

If this be right so far, it is enough to dispose of the defence, for the defendant is a mere trustee of the legal estate and must convey it to the plaintiff. But, if it be wrong, the plaintiff has another string to his bow, namely, section 70 (1) (g) of the Land Registration Act, 1925. It is admitted that at the date of the defendant's registration the plaintiff was in "actual occupation" of the land. The defendant therefore took subject to his rights. What were they? They were an equitable interest in the land existing under the contract of 1936, and the right to bring an action against the company for specific performance by a conveyance of the legal estate. The answer of the defendant here is that these rights, not being protected by a caution on the register, can be ignored by a subsequent purchaser.

If this were unregistered land, the contract of 1936 was an "estate contract" registrable as a land charge under section 10, class C of the Land Charges Act, 1925, and not having been so registered was "void" against a subsequent purchaser (such as the defendant) by virtue of section 13 (2) of the same Act. My attention was called to a decision of my own, *Coventry Permanent Economic Building Society v. Jones*,⁵ where I held (though this was not necessary to my decision) that a subsequent purchaser could ignore the rights of persons in possession under such an unregistered contract, on the ground apparently that the rights of the person in possession, though valid against the vendor, could be treated as void by the subsequent purchaser. Whether this was right or not, I need not here decide, for this is registered land and the Land Charges Act, 1925, has no application to it, as

⁵ [1951] W.N. 218; [1951] 1 T.L.R. 739; [1951] 1 All E.R. 901.

appears by section 23,⁶ so that charges under that Act do not affect the matter. But, argues the defendant, there is a parallel provision in section 59 (1) of the Land Registration Act. It is argued that, as the wording in the section says "only," it means that that is the only way of protecting it, and if you do not so protect it, the charge or the registrable interest is void against a subsequent purchaser.

The answer to this seems to me to be provided by section 59 (6), which excepts "overriding interests" from the need to be protected by a caution. I do not accede to the argument that section 70 (1) (g), preserving the rights of those in actual occupation, is to be limited to such rights as cannot be protected by a caution. This seems to me inconsistent with section 20 of the Land Registration Act, 1925. Moreover, it would have the effect of overruling *Hunt v. Luck*,⁷ and would be inconsistent with the decisions of Danckwerts J. in *Woolwich Equitable Building Society v. Marshall*,⁸ and of Vaisey J. in *Mornington Permanent Building Society v. Kenway*.⁹

My attention was drawn to a number of cases before the legislation of 1925, but, in my judgment, the statutory provisions to which I have referred have superseded them and they are no longer relevant.

In my judgment, therefore, the plaintiff is entitled to succeed on both points and to a declaration that he is the owner in fee simple of the disputed land, and an order for the rectification of the register by the registration of the plaintiff's name in place of the defendant's name in the proprietorship register.

Order accordingly.

Solicitors: *Barton & Hanning; Bower, Cotton & Bower for Sherwood, Cobbling & Williams, Kingston-on-Thames.*

I. G. R. M.

⁶ Land Charges Act, 1925, s. 23:
 "As respects . . . land charges . . .
 "required to be registered or re-
 "registered after the commencement
 "of this Act, this Act shall not apply
 "thereto, if and so far as they affect
 "registered land, and can be pro-
 "tected under the Land Registration
 "Act, 1925. . . ."

⁷ [1901] 1 Ch. 45; 17 T.L.R. 3;
 [1902] 1 Ch. 428; 18 T.L.R. 265
 (C.A.).

⁸ [1952] Ch. 1; [1951] 2 T.L.R.
 783; [1951] 2 All E.R. 769.

⁹ [1953] Ch. 382, 386; [1953] 1
 All E.R. 951.

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BOOK LEAGUE.1957
May 28, 29,
30.Lord Evershed
M.R.,
Morris and
Pearce L.JJ.

Revenue—Income tax—Charity—Covenants to pay subscriptions for seven years—Benefits given to covenantors—Whether charity exempt from tax—Income Tax Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 10), ss. 123, 447 (1) (b).

Charity—Income tax.

The National Book League, a company limited by guarantee, was a body established for charitable purposes only. At its headquarters in London it provided limited club facilities for its members. On December 6, 1951, the league resolved to increase its then subscriptions of £1 ls. for London members and 10s. 6d. for country members except in the case of members who entered into deeds of covenant to remain members and to pay their annual subscription at the then existing rates for at least seven years. Over 2,000 members entered into such covenants with the league. The league claimed under section 447 (1) (b) of the Income Tax Act, 1952,¹ exemption from income tax chargeable for the years 1951–1952, 1952–1953 on payments received by the league by virtue of the deeds of covenant. The Special Commissioners held that the benefits given by the league to its members were trifling and illusory and that the league was entitled to exemption from tax. Vaisey J. reversed their decision:—

Held, that, as the benefits conferred on the members by the league were not minimal and negligible and the members, who had entered into these covenants, had not paid the covenanted sums without any condition or stipulation on the part of the league, such members could not accordingly be treated as donors of the covenanted sums, such sums were not pure income profit in the hands of the charity, and were not entitled to exemption from tax.

Dicta of Lord Normand and Lord Reid in *Inland Revenue Commissioners v. City of London (as Epping Forest Conservators)* [1953] 1 W.L.R. 652, 664, 667; [1953] 1 All E.R. 1075; 34 T.C. 293 applied.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

The National Book League was incorporated on November 28, 1925, under the Companies Acts, 1908 to 1917, as a company

¹ Income Tax Act, 1952, s. 447: “of any body of persons or trust
“(1) Exemption shall be granted— “established for charitable purposes
“ . . . (b) from tax chargeable under “only, or which, according to the
“Schedule C in respect of any inter- “rules or regulations established by
“est, annuities, dividends or shares “Act of Parliament, charter, decree,
“of annuities, and from tax charge- “deed of trust or will, are applicable
“able under Schedule D in respect of “to charitable purposes only, and so
“any yearly interest or other annual “far as the same are applied to
“payment, forming part of the income “charitable purposes only . . .”

limited by guarantee and not having a share capital. The objects of the league were to promote and encourage by all suitable means the habit of reading and the wider distribution of books, and other objects set forth in the league's memorandum of association. Originally the league, which was called the National Book Council, was a small body largely comprising members actively engaged in the production and selling of books. After the 1939-1945 war it was decided to change the method of carrying out its objects by greatly extending its membership. The league's premises had been destroyed by enemy action during the war, and after the war a long lease was acquired of its present headquarters at 7, Albemarle Street, London, W.1. It was not disputed that since September, 1951, the league had been a body of persons established for charitable purposes only.

The members of the league paid annual subscriptions, the minimum rates of which were laid down by byelaws 4 (a) to (n) of the league's byelaws. Byelaw 4 (a) governed the minimum rates of annual subscription payable by ordinary individual members, other than those who were engaged as principals in the manufacture and publishing of books or allied trades, and those who were engaged as principals in or connected as principals with the commercial distribution of books (hereinafter called "ordinary individual members"). Under the byelaw the rates of subscription payable by ordinary individual members prior to January 1, 1952, were £1 1s. in the case of those living or having a place of business within 30 miles of the headquarters of the league, and 10s. 6d. in the case of those not living or having a place of business within such 30 miles. On December 6, 1951, at an extraordinary general meeting of the members of the league, a special resolution was passed that on and from January 1, 1952, the subscription rates should be increased from £1 1s. to £1 10s. and from 10s. 6d. to 15s., respectively, except in the case of members who, renewing their membership up to and including August 31, 1952, entered into deeds of covenant to remain members and to pay their annual subscriptions at the existing rates for at least seven years, and that byelaw 4 (a) should be varied accordingly.

After the resolution of December 6, 1951, had been passed, the chairman of the league sent letters to the members in which he said: "It is due to the generous support of you and your fellow members of the National Book League that the league has since last September been recognized as a charitable organization. This constitutes an historic development in our growth. . . .

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“ It does, of course, greatly enhance our status. It is once and
“ for all (and at long last) recognized by ‘ authority ’ that the
“ work upon which we are engaged is of the greatest social
“ importance. The contribution we are making to the educa-
“ tional services of this country and indeed to the world, is
“ assessed at the highest level.

“ Lack of money puts, of course, a most grievous brake upon
“ our development. We have hitherto been utterly dependent
“ upon the financial support of our public membership. We still
“ are, but there is this difference, and it affects vitally every
“ member of the National Book League. Previously the burden
“ of income tax has pressed equally upon us and upon our
“ members. Our new status now enables us to reclaim from the
“ revenue the tax already paid by you upon your subscription.

“ This means, in effect, that the value of your annual sub-
“ scription to the league is almost doubled without any further
“ cost to you. All that you have to do in order to benefit the
“ league in this way is to covenant to remain a member for a
“ period of seven years.

“ Of even greater importance to you as an existing member of
“ the league is the fact that the signing of this covenant will
“ insure you against any increase in the league’s subscription rates
“ which may take place during a period of seven years. The
“ present rates were fixed six years ago at what seemed the
“ lowest possible minimum. In 1945 half a guinea purchased
“ very much more than it purchases today. Consequently the
“ annual general meeting of December 6 authorized a 50 per cent.
“ increase in public membership rates as from January 1, but the
“ meeting also agreed that those members who covenant will not
“ be affected by these new rates till the financial year 1958-1959,
“ so by signing the covenant you can obtain considerable financial
“ advantage.”

The incidental benefits of membership referred to by the
chairman included attendance at exhibitions, the use of an
information bureau and of the league’s library and other advant-
ages, including the use at the league’s headquarters of certain
rooms, including two sitting rooms (when not used for com-
mittees), and of a restaurant and cocktail bar. In a pamphlet
issued by the league, the headquarters were described as “ your
club.”

There were 10,529 ordinary individual members of the league
out of a total membership of 11,936. 2,821 of the ordinary
individual members had entered into deeds of covenant pursuant

to byelaw 4 (a), as varied by the special resolution of December 6, 1951. All the deeds of covenant were in common form and no point was taken as to their terms.

The actual amount paid to the league by the covenantors for the income tax years of assessment 1951-1952 and 1952-1953 was £3,118 17s. 6d. Certificates of deduction of income tax amounting in the aggregate to £2,820 11s. 1d. had been given by the covenantors on the footing that the payments under the said deeds of covenant were annual payments within the meaning of the Income Tax Acts amounting in the aggregate to a gross sum of £5,939 8s. 7d.

The league claimed under section 447 (1) (b) of the Income Tax Act, 1952, exemption from the income tax chargeable for the years 1951-1952 and 1952-1953 on the payments made under the said deeds of covenant. The Commissioners of Inland Revenue refused to admit the claims and stated that the reason for their decision was that in their view the payments made to the league under the deeds of covenant were made in consideration of membership benefits and were, accordingly, not annual payments within the meaning of the Income Tax Acts.

The Commissioners for the Special Purposes of the Income Tax Act in the case stated found with regard to the facilities afforded to members: "Evidence was given, which we accepted, that very few members were influenced to any appreciable degree to become members or to continue membership by the existence of these facilities; while it was admitted that perhaps one or two per cent. of the members might be so influenced to some extent, we found as regards the great bulk of the members, that they paid their subscriptions or executed their deeds of covenant (as the case might be) solely with the motive of furthering the aims of the league. A few complaints had been received from members, chiefly on the ground that the principal sitting rooms were so often not available for their use."

The contention of the parties and the findings of the commissioners were set forth in paragraphs 12, 13 and 14 of the case stated as follows:—

"12. It was contended on behalf of the league: (1) that the payments made to the league pursuant to the deeds of covenant . . . were 'annual payments' within the meaning of the Income Tax Acts and were (subject to the league's exemption referred to in sub-paragraph (2) below) income of the league chargeable to income tax under Case III of Schedule D, and had borne such tax by deductions; (2) that the league being (as was admitted) a

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“ charity, was entitled to exemption from income tax in respect of
 “ such annual payments by virtue of section 447 (1) (b) of the
 “ Income Tax Act, 1952; (3) that the claim the subject of the
 “ appeal should be admitted.

“ 13. It was contended on behalf of the Commissioners of
 “ Inland Revenue: (1) that the said deeds of covenant were
 “ entered into as the result of a contract between the league and
 “ each covenantor whereby the league was obliged to afford to
 “ the covenantor all the amenities of membership which were
 “ offered at any particular time to every other member of the
 “ league; (2) that such amenities of membership included the
 “ annual provision of goods and services; (3) that the payments
 “ received by the league pursuant to the deeds of covenant
 “ were received in consideration of the annual provision by the
 “ league of goods and services; (4) that the said payments were
 “ accordingly not ‘ annual payments ’ within the meaning of the
 “ Income Tax Acts; (5) that the claim accordingly failed.

“ 14. We, the Special Commissioners who heard the appeal,
 “ were of the opinion that our first duty was to determine what
 “ was the real substance of the facilities . . . in which the Crown
 “ contended involved goods and services which the league was
 “ bound by contract to provide for persons who had entered into
 “ covenants. While we did not think it material, for the purpose
 “ of deciding the issue before us, to make a precise measurement
 “ of their value, we were of opinion that it was a critical matter
 “ to determine whether they had any real substance to which we
 “ should have regard, or were merely trifling or illusory. When
 “ we considered each of them separately, and all of them together,
 “ in the light of all the evidence before us we came to the con-
 “ clusion, as a matter of fact, that such advantages to members
 “ as they afforded were so trifling as to justify us in describing
 “ them as affording no advantage of a substantial character. That
 “ being our conclusion as to the nature of the said facilities, we
 “ held that we could (so far as concerned the legal arguments
 “ addressed to us) dismiss them from our minds according to the
 “ principle ‘ de minimis non curat lex.’

“ We held that the payments received by the league pursuant
 “ to the deeds of covenants were ‘ annual payments ’ and income
 “ of the league chargeable to income tax (subject to the league’s
 “ exemption as a charity) under Case III of Schedule D, and
 “ accordingly we allowed the claim.”

The commissioners in the case stated asked: “ (1) whether
 “ there was evidence to enable us to arrive at our conclusions of

“fact set forth in paragraph 14 of this case; (2) whether our conclusions of law in paragraph 14 of this case are correct.”

Vaisey J. reversed the decision of the commissioners. He concluded his judgment as follows: “I hesitate long before I disturb a finding of fact by the Special Commissioners, but it seems to me quite impossible in this case to say that the evidence establishes that these privileges were merely illusory or were so trifling as to justify the commissioners describing them as affording no advantage of a substantial character. I cannot accept that. It seems to me to be in the teeth of the evidence afforded by the literature which was annexed to the case and by the ordinary common sense of mankind. People living in the country, or who have lived in the country, must know perfectly well that this is just the sort of place for which countrymen are always on the lookout, where they can lunch comfortably, get a five-shilling lunch and a drink, and a comfortable room where they can sit; and, indeed, we have evidence on the case itself that so much are these privileges valued that there were sometimes complaints that they were not always with sufficient frequency available. I have every hesitation in disturbing their finding, and every desire to give the fullest weight to the views which the commissioners have reached, but it seems to me that their view that these advantages ought to be disregarded as trifling and illusory, with no substance in them at all, is really not justified by the evidence. When the commissioners accept the evidence that the people who joined this covenant scheme did so not for the purpose of anything they could get out of it but merely in order to benefit literature, I think that they paid less attention than I should have paid, or an ordinary recipient of the letter would have paid, to the very flattering and attractive terms which were set out in the circular letter of the chairman of the league. There is no doubt that he was impressing on people that they were going to get some real advantages. I think they were going to get financial benefit, and the incidental benefits of membership which were considerable. Those expressions in the chairman’s letter were justified and true. Anyone who received that letter would not have dismissed them as meaning nothing at all, but in many cases undoubtedly must have been induced by that very flattering description—not too flattering, because I think it was justified—to go on being members of the league or to join the league. Those expressions were bound to have had, not an occasional or slight effect on people’s minds but one which

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“ really went to the root of the matter in the dealings between
“ the league and the members, as is exemplified by the execution
“ of these various covenants.

“ I wish in conclusion to mention the very distinguished
“ names which appear as members of and supporters of the
“ society; I am not at all surprised to see them there, and I have
“ no doubt that this league is doing most admirable work; but the
“ fact remains that these covenanted payments were not ordinary,
“ typical covenanted subscriptions to a charity. I think they were
“ payments to the incorporated body (the league) in return for
“ which the subscriber got some substantial advantage, so that
“ these payments cannot be described as pure income payments
“ when they reached the hands of the league and those who
“ conducted its affairs. It is true that there is no definite finding
“ of the commissioners as to what additional cost was incurred by
“ the league in providing the facilities which the covenanting
“ subscribers got, but the balance sheets and the profit and loss
“ accounts show that there was a considerable expenditure in
“ these directions, and although I would be delighted to return
“ the matter to the commissioners to allow them to give a definite
“ finding on that point—(that is to say, to turn their minds away
“ from what the covenantors got out of their covenants and to
“ look at what the league itself had to pay in order to provide
“ those benefits)—I do not think that any good purpose would be
“ served by this. The result is that, with every anxiety to acquit
“ everybody of any intention to deceive or of anything wrong or
“ underhand, or anything of that kind, I do not think that this
“ was, in the proper sense, a covenanted subscription to a charity,
“ and I think that this appeal must be allowed.”

The league appealed.

P. J. Brennan and *Mrs. H. Wilson* for the National Book League. The league is admittedly a charity and claims to be entitled to exemption from income tax under section 447 (1) (b) of the Income Tax Act, 1952, in respect of the annual payments made under covenants entered into by its members. It is alleged by the Crown that these payments were trading receipts made pursuant to a contract entered into by the league with the covenantors for the supply of certain goods and services. It is submitted that whether this arrangement between the league and its members was a commercial contract is a question of fact. The Special Commissioners found that the benefits conferred on the covenantors were trifling. They had evidence on which

they could so find. That finding was a finding of primary fact and the judge should not have substituted his judgment for theirs. Further, there is no evidence that this arrangement constituted a binding contract. If there was no contract, then there could not have been a purchase and sale of goods and services. It is unreasonable to take a few words out of a brochure and say these show the true nature of the transaction. The transaction must be looked at as a whole in the light of all the circumstances and, so looked at, the payments under these covenants were pure income payments. If the true effect of this arrangement is not a pure question of fact, the court must look at the true position. If the covenantors had contractual rights, they could not have been unilaterally disclaimed. The league was not bound to supply any particular services for its members. There is no finding that the league was carrying on a trade. These payments fall within Case III of Schedule D and are pure income payments. The onus is on the Crown to show that the league is not entitled to tax relief. There being evidence to support the conclusion of the commissioners, their decision should not be set aside.

Geoffrey Cross Q.C., Sir Reginald Hills and E. B. Stamp for the Crown. With regard to the form of the covenant: the covenantors are treated as having paid a gross sum and the league claims to recover the tax. That claim can only be justified if the payments were annual payments within the Income Tax Acts. It is common for charities to make money from non-charitable activities. The judge was justified in holding that the benefits accruing to the covenantors did not fall within the *de minimis* principle. The real question is: were these payments pure gifts? If not, no tax is recoverable. If there is any element of purchase in these covenanted payments, they are not pure income payments. The benefits received by the covenantors were substantial. The running of a school may be a proper activity of a charity, but it is not entitled to receive tax relief in respect of payments made to it. If it makes a profit, that profit is taxable: *Brighton College v. Marriott*.² The league must show that these were annual payments within Case III of Schedule D. If a charity makes a profit in respect of its trading activities, such profits are taxable, unless exempt by some provision of the Acts. The onus is on the taxpayer claiming repayment to show that these are annual payments. [Reference was made to *Earl Howe v. Inland Revenue Commissioners* ³; *Governors of the Rotunda*

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² [1926] A.C. 192; 42 T.L.R. 228;
10 T.C. 213.

³ [1919] 2 K.B. 336; 35 T.L.R.
461; 7 T.C. 289.

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*Hospital, Dublin v. Coman*⁴; *Inland Revenue Commissioners v. City of London (as Epping Forest Conservators)*.⁵]

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Sir Reginald Hills following. The question whether a payment is an annual payment is not affected by the fact that the payee is a charity. Most public schools are subject to charitable trusts. They provide services for parents. A covenant to pay fees is not an annual payment, since services are being given for the fees. The position was the same in the case of a covenant to make payments to a hospital, if they were made on the footing that the payee would be taken into the hospital. The brochure issued to members of the league tells them what they will get if they enter into covenants. The payments are for services.

P. J. Brennan in reply. Where a person receives a benefit, the quality and nature of the benefit has to be considered. This is a non-trading charity. The benefits accruing to the covenantors are negligible in quantity and quality. They get no financial benefit. These payments are not trading payments and should qualify for tax relief. [Reference was made to *Manchester Corporation v. McAdam*⁶; *Inland Revenue Commissioners v. Hogarth*⁷; *Inland Revenue Commissioners v. City of Glasgow Police Athletic Association*.⁸]

LORD EVERSHERD M.R. The National Book League is a company limited by guarantee which was formed in the year 1925. It was not disputed that since September, 1951, the league has been a body established for charitable purposes only. The question on the appeal arises in relation to some 2,000 or more deeds of covenant in a common and well-recognized form entered into by persons who were members—I have emphasized that word for reasons which will later appear—of the league whereby the covenantors covenanted to pay for a period of seven years, if they so long lived, such a sum as after deduction of income tax would leave the net figures of either one guinea or 10s. 6d. The National Book League sought to recover the amount of tax which had been deducted from the notional gross sums named in the deeds of covenant pursuant to section 447 (1) (b) of the Income Tax Act, 1952 [which his Lordship read].

⁴ (1919) 36 T.L.R. 646; 7 T.C. 517.

⁵ [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.

⁶ [1896] A.C. 500; 12 T.L.R. 606; 3 T.C. 325; 491.

⁷ 1941 S.C. 1; 23 T.C. 491.

⁸ [1953] A.C. 380; [1953] 1 All E.R. 747.

It is not in doubt that the tax chargeable falls under Schedule D. It is the contention of the league that the case is one which is comprehended by Case III of Schedule D, now enshrined in section 123 (1) of the Income Tax Act, 1952, where it is stated: "Case III—tax in respect of—(a) any interest of "money, whether yearly or otherwise, or any annuity, or other "annual payment. . . ." It is the contention of the National Book League that the gross sums in question are annual sums within the comprehension of Case III or section 123, and that the league is entitled, according to the terms of paragraph (b) of section 471 (1), to recover the tax which has been deducted by the covenantors.

I confess I have found the case somewhat troublesome, not least because of the conclusions to which the extremes of the argument on either side might appear to lead. It was, for example, on the one side observed by Mr. Cross that, if the argument for the league were sustained, it might be possible for a charity which, in accordance with well-known practice, may require each year to augment its funds or increase public interest by holding a dance, to invite well-disposed persons to enter into deeds of covenant for seven years for a figure in return for which they would be supplied with dance tickets for the charity dance in each of the following seven years. In such a case I do not myself feel much doubt that the substance of the matter would be an arrangement for buying in advance dance tickets for charity dances by means of a covenanted payment of that kind. That being the substance of the matter, it would be difficult to see, as it seems to me, how it could be brought within Case III and entitle the charity to recover tax.

On the other side and at the other extreme, the instance was taken of well-known charities, of which the National Art-Collections Fund may be taken as an example. In such cases, as is well known, the donors, the covenantors in favour of such charities, get certain privileges. They may be allowed the use of certain reading rooms; they may be given the privilege of attending private exhibitions in private houses or elsewhere; and to many I do not doubt these privileges are by no means negligible. But although that case, again, is not before us, it seems to me, as at present advised, that it would altogether offend good sense and good law to say that the sums covenanted in such cases were not gifts to the charity in question, that they were not pure income profit, to use Lord Greene M.R.'s phrase, in the hands of the charity. But the present case (and this is,

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of course, a truism applicable in all cases) must turn upon its own special facts; and the facts in the present case are special in a marked degree.

First, however, it must be stated that it is now clear that the fact that the National Book League is recognized as a body incorporated for charitable purposes only cannot be conclusive of the case in its favour. So much was clearly laid down by the House of Lords in *Inland Revenue Commissioners v. City of London*,¹ the case referred to commonly as the *Epping Forest* case. In that case the House, having rejected that answer to the claim for tax, proceeded to arrive at the same conclusion as this court on the ground that, when full examination was made into the facts, it appeared that the sums paid by the Corporation of London for the purpose of maintaining the Epping Forest were paid without any conditions or counter stipulations being made in return.

I cite one paragraph from the speech of Lord Normand²:
 “My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under rule 19 but the payee would not be entitled to recover the tax.”

That paragraph, it seems to me, states also the problem in this case. Applying to this case the sentences which I read,

¹ [1953] 1 W.L.R. 652; [1953] 1 All E.R. 1075; 34 T.C. 293.

² [1953] 1 W.L.R. 652, 664.

can it fairly be said that the covenanted sums here, having, as they undoubtedly have, the requisite quality of recurrence, were paid, without conditions or counter stipulations, out of taxed income? In answering that question, it is clear that one must look at the facts of this case and at their substance and reality.

I have said that the facts, as it seems to me, are in many respects special. The National Book League is a league, in the sensible use of that phrase, of members who support its objects. It is a company limited by guarantee. Its funds, to a large degree at any rate, are obtained from membership, by getting from members their annual subscriptions. All the members become, as I understand the constitution of the league, members of the company, and their subscriptions, or at least their minimum subscriptions, as they are called, and their rights and duties, are regulated under the company's regulations, that is, its articles and byelaws made thereunder. Strictly speaking, the members, like members of other institutions, cannot resign save on giving some appropriate notice.

It is also to be observed, and this is another special feature of the case, that differential rates are applied to members who live or have their business in London and country members who live away from London. That, indeed, is not of itself necessarily surprising; I state it, however, as a fact. When the objects of the league are examined, it is to be noted that the first of the objects as stated in the memorandum is: "To promote and "encourage by all suitable means the habit of reading and the "wider distribution of books," and it cannot be doubted that, since the company is established in London, the means whereby the habit of reading can be encouraged will be found most naturally situated in London, so that its supporters, those who desire to benefit from the objects of the league and who live in London, will find the benefits more readily available than will persons who live a great distance from the capital.

The next thing to observe is that at the end of the last war the league decided, as a definite part of its policy, to acquire a house of no little architectural merit in the west end of London, 7, Albemarle Street, and to use that not only as the headquarters of the league but also in some degree as club premises, providing in some degree what would be understood as club amenities.

One of the documents attached to this special case is a document called a brochure. The actual date when this document first was distributed does not anywhere appear. But it has been referred to in the course of the argument, and I think

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it legitimate for present purposes to refer to it now. It states that the league is, as is undoubtedly the fact, a fellowship of booklovers; but the passage in it to which I wish now to direct attention is that section of it which is headed: "Your club: "7, Albemarle Street." "The house at 7, Albemarle Street, "London, W.1, gives the facilities of a club to members and "their friends from many parts of the country and from overseas." Then it observes that during certain hours use may be had of a reading room, a drawing room, and a licensed bar and restaurant. In such a publication it is not to be expected that the authors would understate the amenities which are offered, though it has been pointed out, and not unfairly, that when you consider the total membership, which is over 10,000, the amenities are somewhat strictly limited in fact. However, the point is that it is a feature, made prominent in this brochure, that at this house, 7, Albemarle Street, there is provided in some sense and in some degree what is called "your club." It should, however, in this connexion be stated, as Mr. Brennan pointed out, that there is no obligation to continue to provide these amenities. Under the terms of the regulations of the league those responsible for its management could at any time, and no doubt would if they found "the club" was not successful, discontinue those amenities altogether.

Against that background I come to the next document to which allusion should be made, namely, the special resolution of the company, that is, of the members, which was passed on December 6, 1951. Up to that time it appears that the subscriptions, or the minimum subscriptions, payable by individual members, as distinct from corporate members, were one guinea in the case of London members and 10s. 6d. in the case of country members. This resolution was as follows: "That on "and from January 1, 1952, the annual subscription payable by "ordinary individual members . . . be increased from £1 1s. 0d. "to £1 10s. 0d. and from 10s. 6d. to 15s. respectively (except "in the case of such members who renewing their membership "up to and including August 31, 1952, enter into deeds of "covenant to remain members and to pay their annual subscriptions at the existing rates for at least seven years)." And this again was part of the policy of those responsible for the management and for using 7, Albemarle Street, as the league's headquarters.

The next thing that happened was that the chairman addressed a letter to the existing members. As very much of the argument

revolved round that letter, I propose to read a substantial part of it. It starts: "Dear member," and after saying that it is "the generous support of you and your fellow members" that has enabled the Book League to carry on, the letter states that the league has been given the privilege of being received among the company of those established for charitable purposes only. That, the chairman says, greatly enhances our status. Then he goes on as follows: "Lack of money puts, of course, a most "grievous brake upon our development. We have hitherto been "utterly dependent upon the financial support of our public "membership. We still are, but there is this difference, and it "affects vitally every member of the National Book League. "Previously the burden of income tax has pressed equally upon "us and upon our members. Our new status now enables us to "reclaim from the revenue the tax already paid by you upon "your subscription." That is not entirely an accurate statement, but its meaning is not in doubt, and, indeed, it is stated in the following paragraph: "This means, in effect, that the "value of your annual subscription to the league is almost "doubled without any further cost to you. All that you have "to do in order to benefit the league in this way is to covenant "to remain a member for a period of seven years." Then he sets out the figures which show what the result would be in pounds, shillings and pence of the recovering of tax in respect of various contributions by the members. Then he states this: "Of even greater importance to you as an existing member of "the league is the fact that the signing of this covenant will "insure you against any increase in the league's subscription "rates which may take place during a period of seven years." He then states what the rates have been, and refers to the special resolution which I have mentioned, and proceeds: "so by "signing the covenant you can obtain considerable financial "advantage." Then, omitting the paragraph which refers to the form of the covenant, he concludes: "May I ask you most "earnestly to support the work we are doing by taking this step. "The incidental benefits of membership are considerable and "you will be sharing in work which needs most urgently to be "done and which has now received, as I have already said, the "highest official recognition," a reference to the fact that the Board of Inland Revenue had conceded to them the status of a body established for charitable purposes.

As a result of that letter a large number of members executed these covenants. For the purposes of the present appeal we

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must, I think, assume that all the covenanted income with which we are concerned was income paid under covenants entered into in response to that letter or similar letters addressed to members. There may have been since, and there may be hereafter, other covenants executed in favour of the league by members, and as to such other covenants I say nothing at all. I am confining myself to such covenants as must be taken to have been executed in response to that request.

- It is to be noted that the deed of covenant is in perfectly normal form, and makes no reference anywhere to any corresponding promise by the league, or, indeed, to the fact of the sum paid being taken as a subscription. But it cannot be doubted that those who entered into these covenants in response to that letter must have been doing so in the faith that the sums paid, £1 1s. 0d. and 10s. 6d. according to their place of residence, would be accepted as payment in full of their subscriptions for seven years, notwithstanding the increases in the subscription rates to the rest of the members. It follows, therefore, that these covenantors may be said to have been promised and to have obtained two advantages. In the first place, they were able to continue members at the lower, pre-December, 1951, subscription rates, and they had a promise or assurance that during the seven years their subscription rates would not be raised, whatever might happen to other persons' subscription rates; second, they had the advantage that, paying the lower, pre-existing, rates, they would continue to enjoy, like other members who paid the greater rates, the amenities, the so-called club amenities, of No. 7, Albemarle Street.

- It was contended by the Crown that as a result particularly of the chairman's letter on the one hand and the execution of the deed of covenant on the other, certain specific contractual rights arose. It was said that the league was contractually bound to every covenantor not to increase his subscription beyond his particular rate during the seven years his covenant lasted. What exactly would be the position if one of the covenantors who signed lived, at the time when he signed it, in Edinburgh and three years later came to London is not a matter that I need pursue; but upon that aspect of the matter, without stating any conclusion as to the precise legal result, I am disposed, for my part, to agree with the contention of the Crown that the league had put themselves in a position in which they could not, without breach of an obligation of some kind to the covenantors, increase

the appropriate subscription rates above the covenanted net sums for the period of the covenants.

It was also said that the league had entered into some contractual obligation or stipulation in regard to the so-called club amenities. Again without expressing any final view, I should not, as at present advised, so conclude. I cannot see in these transactions any contractual promise to provide any particular amenities; but no doubt it is true to say that so long as the covenantor was entitled to treat himself as a member, notwithstanding that his subscription rate was lower than that of other members, he would be entitled, as other members, to enjoy whatever amenities were available from time to time at 7, Albemarle Street, or indeed elsewhere.

The question, therefore, as I see it, turns first upon this. Looking at the substance and reality of the matter, can it be said that those who entered into these covenants have paid the sums covenanted without conditions or counter stipulations; and, on the whole, I have come to the conclusion that they cannot so say. It seems to me that against the special background of this case, and, having regard to the terms of the letter, there was here, in a real sense, a condition or counter stipulation on the part of the league against which the covenant was entered into. I must guard myself against saying that whenever one finds a covenantor in favour of a charity getting allowed to him certain privileges, it therefore follows that such a covenantor no longer can say that he has paid without conditions or counter stipulations. If the test be, as I venture to think it is, whether in all the circumstances, and looking once more at the substance and reality of the matter, these covenantors can be treated as donors of the covenanted sums to the charity, I have come to the conclusion that the answer must be in the negative, subject to the point to which I will now come as to the extent of the conditions or counter stipulations. The aspect of the matter, with which I have so far dealt, does not appear, as I follow the case stated and the judgment of Vaisey J., to have taken at all a prominent part in the argument before the matter was debated in this court. The matter seems rather to have been dealt with before the Special Commissioners and before the judge solely upon the question whether the privileges which the covenantor members admittedly obtained were of so illusory and negligible a character as to be properly disregarded on the principle of *de minimis non curat lex*.

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It was observed by Sir Reginald Hills that, if one looks at the case and the arguments which are there recorded, that particular point, namely, that the privileges, the amenities, offered were—and I will use the words of the Special Commissioners—trifling and illusory, was not in fact ever put forward by those responsible for the league, and I can well appreciate his point that it would hardly lie in the mouths of those responsible for the league so to contend. But undoubtedly the Special Commissioners decided this case on the view they formed that in truth they “were so trifling”—again I am quoting—“as to justify us in describing them as “affording no advantage of a substantial character.”

It was upon that point, whether that decision could be sustained, that the matter went before Vaisey J., and he came to the conclusion that, upon the evidence, such a conclusion could not be justified in law.

The question whether particular advantages or promises can be dismissed on the principle of *de minimis non curat lex* must, I think, be a matter for the lawyer rather than for him who has to find facts, and, on the facts as they are here presented, I am unable to see any proper justification for the conclusion which the Special Commissioners upon this point reached. Particularly I refer to the fact that the covenantors, I think, did get at the very least a clear promise from which the league could not draw back without gross breach of faith and, as I am inclined to think, without also a breach of contract, that they would continue to have advantages of membership at a lower subscription rate than other persons, and that they would be immune from the possibility of increase of subscription rates during the whole period of the covenant. It seems to me impossible to dismiss that matter as being trifling and illusory, and to disregard it on the principle of *de minimis non curat lex*. I am, therefore, upon this point unable to accept the argument of Mr. Brennan that it is a pure question of fact upon which the conclusion of the Special Commissioners must be found. Upon that matter I agree entirely with the conclusion of Vaisey J. to which, indeed, I cannot usefully add anything.

Taking that view, and also concluding, as I do, that in the circumstances of this case the league failed to establish that the sums paid under the covenants can be regarded, to use again Lord Greene M.R.'s phrase, as pure income profit within Case III of Schedule D, and such as to entitle under section 447 the league to recover the tax, I would dismiss the appeal.

MORRIS L.J. The National Book League, being a charity, claims under section 447 (1) (b) of the Income Tax Act, 1952, that it should have exemption from income tax chargeable for the years 1951-1952 and 1952-1953 on payments received by the league by virtue of deeds of covenant which were made by certain members of the league in 1952. Those members, some 2,821 in number, availed themselves of an opportunity which was given to them by the terms of a special resolution passed on December 6, 1951. The 2,821 were all members at that time. They were members of the company limited by guarantee whose name is the National Book League. The subscriptions of the ordinary individual members of the National Book League were then being raised. The increase could be avoided by such members who, renewing their membership up to and including August 31, 1952, entered into deeds of covenant to remain members and to pay their annual subscriptions at the then existing rates for at least seven years. So it came about that the covenants were entered into.

The question arises whether the payments made pursuant to the covenants can be said to be annual payments within the scope of Case III of Schedule D. Lord Reid, in his speech in *Inland Revenue Commissioners v. City of London (as Epping Forest Conservators)*,³ said this: "I think it well to consider certain annual payments, not related to any benefit to the payer, which in my opinion are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade I cannot see how such a payment can be excluded from the scope of Case III. What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts: certain provisions entitle them to certain particular exemptions from tax."

The question arises whether the payments can be said to be pure gifts to the charity. In the terms of a phrase which has been used, can the payments be said to be pure income profit in the hands of the charity? If the payments were made in such circumstances that the league was obliged to afford to the covenantors such amenities and such benefits of membership as would at any particular time be offered to all members, and if those amenities and benefits were appreciable and not negligible, then

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³ [1953] 1 W.L.R. 652, 667.

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—
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—

I do not think that the payments were pure income profit in the hands of the charity.

In approaching this case I share the admiration which was expressed by Vaisey J. for the objects and purposes of the league, and I would have been happy if my view of the facts and the law could have led to a result which was financially satisfactory for the league. But I have come to the same conclusions as those reached by the judge. I have little doubt that members of the league were motivated by a desire to give financial support to its work. But in order to stimulate and encourage their support inducements were offered in the form of attractive advantages to be enjoyed by members. These are set out in the case stated, and have been referred to by my Lord, and I need not now further detail them. The fact that advantages are possessed, including, though in quite limited and modest form, certain club facilities, is reflected in the circumstances that the amounts of the subscriptions are decreed, though, of course, payments voluntarily made at higher rates would be welcome. But in the case of subscriptions for a good cause, it is not ordinarily the case that there is any fixation of amount nor, indeed, any differentiation in rates between persons living in London and persons living in the country. Nor would it happen that those advancing the interests of a good cause would write to advise the subscribers as to a way of protecting themselves against paying more than they were paying.

In my judgment, the invitation to the existing members of the league in the early part of 1952 was an invitation to sign covenants so that they would pay subscriptions for the ensuing seven years at the then existing rates and so avoid the newly prescribed rates. Members were reminded that though by paying they were promoting good work, they were themselves also receiving, in that they were receiving the incidental benefits of membership which were quite fairly described as considerable. Though these benefits might in fact be availed of by few, they were available for all, and they cannot be ignored as being minimal and negligible.

In the result, therefore, I cannot regard the subscriptions as being pure income profit. I would dismiss the appeal.

PEARCE L.J. I agree.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Field, Roscoe & Co.*

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BARCLAYS BANK LTD. v. MARSHALL AND OTHERS.

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10, 30.

[1956 M. 1071.]

Jenkins,
Romer and
Sellers L.JJ.
—

Conflict of Laws—Adoption—Succession—Will—Adopters domiciled in British Columbia—Children born and adopted in British Columbia—Whether adopted children entitled under substitutional gift to issue of adopter under English will—Adoption Act, 1950 (14 Geo. 6, c. 26), s. 13 (1) (4).

Will—Construction—Class gift—Postponed vesting of—Class ascertained at death of testator—"Issue"—Whether including adopted child.

Will—Construction—Substitutionary gift.

A testator, by his will, dated April 12, 1945, bequeathed legacies and his residuary estate after the death of his wife to certain named cousins, which included C. S. J., with a substitutional gift as follows: "Provided always that should any of the "above cousins be then dead leaving issue then living such issue "shall take the share which his her or their parent would have "taken had such parent survived me and my said wife and if "more than one in equal shares." The testator died in June, 1945, domiciled in England, and his wife died in January, 1955.

C. S. J. had before 1912 obtained a British Columbian domicile; he was married, but there was no issue of the marriage. In March, 1945, C. S. J. and his wife, by an order of the British Columbian Supreme Court, adopted a boy. C. S. J. died in February, 1950.

It was agreed that "issue" in the will meant "children"; and that in the absence of expert evidence on the construction of British Columbian statutes they should be construed as if they were British Acts of Parliament. Adoption in British Columbia was regulated by the Adoption Act, 1920, as amended by statutes of 1936, 1948, 1953 and 1956. By section 7 (c) of the Act of 1920: "The parent by adoption and the minor [adopted child] "shall sustain toward each other the legal relation of parent and "child . . . including the right of inheritance and succession to " . . . property from each other . . ." By section 10 of the Act, as amended in 1936: "The word 'child' or 'issue,' or its equivalent "in a will . . . shall include a child adopted by testator . . ." By section 10 (1) of the Adoption Act, 1948, as amended by the Act of 1953: "As to inheritance and succession to . . . property, a "person adopted . . . shall . . . stand in regard to the kindred "of his parent by adoption in the same position as if born to "that parent in lawful wedlock." By the Act of 1956: "For all "purposes an adopted child becomes on adoption the child of the "adopting parent . . . as if . . . born . . . in lawful wedlock."

On the assumption that a child adopted under the law of his domicile was not precluded from taking a gift under an English will to the "child" of his adoptive parents:—

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Held, (1) that *prima facie* adopted children were excluded equally with illegitimate children by the rule that when a testator spoke of the children of A, he was taken to be referring exclusively to lawful children, and that if a different intention was to be attributed to a testator, so far as adopted children of foreign domiciles were concerned, the rule should not be departed from further than was necessary, and only those children placed by adoption in a position, both as regard property rights and status, substantially equivalent to that of natural children could be treated as being within the testator's contemplation.

In re Fletcher [1949] Ch. 473; [1949] 1 All E.R. 732 approved.

(2) That the status and capacity of adopted children of foreign domicile to take under a gift to "children" in an English will was fixed once and for all by the legislation existing at the testator's death, and that subsequent legislation in the country of the domicile enlarging their rights was to be disregarded.

(3) That the rights and privileges conferred by the relevant legislation—namely, the Adoption Act, 1920, of British Columbia, as amended in 1936—fell far short of those which characterized the status of a child, and it was impossible to suppose that an English testator in a bequest to "children" could have had in contemplation adopted children with rights as limited as those under the Act of 1920 as amended in 1936.

Lynch v. Provisional Government of Paraguay (1871) L.R. 2 P. & M. 268 applied.

In re Luck's Settlement Trusts [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307 distinguished.

(4) That the adopted child of C. S. J. was not, therefore, entitled to take under the substitutional gift in the will of the testator to "issue."

Per curiam. That although the amending legislation of 1956 appeared to be sufficient to place an adopted child in the position of that of a natural child for all purposes, it was doubtful whether that of 1953 was capable of having that effect.

Decision of Harman J., ante 263; [1957] 1 All E.R. 549 affirmed.

APPEAL from Harman J.¹

The following statement of facts is taken from the judgment of the court: This was an appeal from a decision of Harman J., whereby he rejected the claim of the eighth defendant, Anthony Francis Stansfeld Jones, to share in the estate of the testator, Chapman Frederick Dendy Marshall. This defendant, who now appealed, was the adopted child of a deceased cousin of the testator, Charles Stansfeld Jones, and he claimed by substitution the share which that cousin would have taken had he survived the period of distribution of the testator's estate.

¹ Ante 263; [1957] 1 All E.R. 549.

The facts were not in dispute. The testator was domiciled in England, and made his will on April 12, 1945. After appointing Barclays Bank Ltd. to be the executor and trustee thereof he devised and bequeathed the residue of his estate to the bank upon the administrative trusts expressed in the Statutory Will Forms, 1925, and directed the bank to pay the annual income of his residuary estate to his wife, Adela Rose Marshall, during her life and further directed the bank to permit his wife to have the use of certain personal chattels during her life. After specifically devising certain properties to which he would become entitled on the death of his wife under his marriage settlement the testator (by clause 14 of the will) bequeathed on the death of his wife a number of legacies, including a specific legacy of the articles set out in subclause (d) of clause 14, which he gave to such of four cousins whom he named as might be then living "and the following descendants of my late aunt Eliza Jones viz. (a) such of the three children of his first marriage of the late Claude Percy Jones . . . as shall then be living (b) Charles Stansfeld Jones (c) Eliza Clara Frances Jones . . . and (d) Anne Gertrude Jones . . . in equal shares except that the children of the late Claude Percy Jones shall take between them one share only (to be equally divided between them if more than one) Provided always that should any of the above cousins be then dead leaving issue then living such issue shall take the share which his, her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares." By clause 15 of the will the testator gave, devised and bequeathed all the residue of his real and personal estate not thereby or by any codicil thereto otherwise disposed of "to the same persons and in the same shares and subject to the same provisions as set out in sub-clause (d) of clause 14 hereof." It was agreed by the parties, and was clear, that having regard to the context in which it appeared, the word "issue" in the proviso to clause 14 (d) of the will was to be construed as meaning "children."

The testator died on June 14, 1945, and his will was duly proved by the bank. The testator's widow survived him and died on January 21, 1955. The Charles Stansfeld Jones named in the will predeceased the widow, his death occurring on February 24, 1950. On the death of the widow, the testator's chattels and residuary estate fell to be distributed, and for present purposes the question in issue was whether the eighth defendant was

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It appeared from the evidence that Charles Stansfeld Jones emigrated many years ago and had become domiciled in British Columbia by, at all events, 1912. He was married but had no issue. The appellant was born on August 25, 1934, at Vancouver, British Columbia, and his parents were domiciled there. On March 9, 1945, he was legally adopted by Mr. and Mrs. C. S. Jones under an order of the Supreme Court of British Columbia. The order was entitled "In the Matter of the 'Adoption Act' " being Chapter 6 of the Revised Statutes of British Columbia "1936 and In the Matter of Anthony Yates," which was, at the time of the order, the appellant's name. The order provided that the appellant "born on August 25, 1934, at the City of "Vancouver, in the Province of British Columbia, be and is "hereby jointly adopted by Charles Robert Stansfeld Jones and "Prudence Rubins Stansfeld Jones the petitioners herein"; and it was further provided that the appellant should take and should thereafter be known by the name of Anthony Francis Stansfeld Jones. Thenceforward the appellant lived with Mr. and Mrs. C. S. Jones, as also did the ninth defendant, Deirdre Georgina Stansfeld Jones, whom the Jones had adopted some years previously, but without obtaining an order from the court.

Harman J. held that, there being no formal adoption of Deirdre Georgina Stansfeld Jones, she could claim no rights of inheritance in an English will. The relevant date for ascertaining the class of persons capable of taking was the date of the testator's death in 1945 and not that of his wife in 1955 when the interest vested; and that Anthony Francis Stansfeld Jones could not succeed, since neither by English law nor by British Columbian law at that date did an adopted child have any general rights of inheritance and succession. Had the relevant date been that of the wife's death in 1955 he would have succeeded, since the law of the succession imputed reference to the law of the domicile in matters involving status, and by British Columbian law at that date an adopted child stood in regard to the kindred of his parents by adoption as if born of those parents in lawful wedlock.

Anthony Francis Stansfeld Jones appealed from that judgment, but no appeal was brought by the adopted girl, Deirdre.

The other defendants gave notice under Ord. 58, r. 6 (2), that the decision should be affirmed on grounds not relied on before Harman J.

[The Adoption Acts of British Columbia, so far as relevant, are set out in the judgment. In the absence of expert evidence as to their construction, the parties agreed that the court should construe them as if they were British Acts of Parliament.]

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Mark Cockle for Barclays Bank Ltd.

P. Ingress Bell Q.C. and *J. G. Le Quesne* for the appellant, Anthony Francis Stansfeld Jones. On the appeal it is contended that the judge was wrong in his construction of the will that the death of the testator was the relevant date by which the appellant had to qualify as a child of Charles Stansfeld Jones. On the cross-appeal it is maintained that the judge's decision was right as to the relevant date, but it puts in issue the question whether an adopted child could take under a gift to issue, even if the relevant date were different.

The judge purported to close the class against everyone at the date of the testator's death; the proper date is that of the death of the tenant for life: *In re Luck's Settlement Trusts*.² On this issue it must be assumed that the appellant can qualify at some time, and on that assumption, this being a substitutional gift and not a direct gift, the death of the tenant for life, in 1955, is the correct date. The qualification under a substitutional gift is a fluctuating one, and the class is not, as the judge held, closed once and for all at the testator's death. It is conceded that in a vested gift the position is not fluid: see Theobald on Wills, 11th ed., p. 306.

The decision of Harman J. on this point was criticized in *In re Stuart*,³ a similar case and also a substitutional gift, in the Supreme Court of British Columbia, where it was held that the relevant date should be that when the gift comes into operation, and was fixed by the testator as the death of his widow. For the principle that in the case of a substitutional gift the relevant date is that of the death of the tenant for life, reliance is placed on *Luck's case*,⁴ *In re Pearson*⁵ and *In re Stuart*.⁶

Adoption is a question of status for which one looks to the law of the child's domicile. For practical purposes the relevant legislation of British Columbia is the Adoption Act, 1920. Before the date of the testator's death section 10 (as amended in 1936) provided that the words "child or issue" in a will included

² [1940] Ch. 323, 330, 331, 864, 884; 56 T.L.R. 333, 915; [1940] 1 All E.R. 375; [1940] 3 All E.R. 307.

³ June 28, 1957.

⁴ [1940] Ch. 864.

⁵ [1946] V.L.R. 356.

⁶ June 28, 1957.

C. A. the adopted child of the testator unless expressly excluded. An
1957 adopted child was thus in the same position in regard to inheritance as a natural child.

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[ROMER L.J. That does not alter the status of a child; it only gives it certain rights.]

Status is the giving of certain rights and, presumably, of certain duties.

[ROMER L.J. It is not saying that, for all purposes, it is making the status of the adopted child that of a natural child.]

[JENKINS L.J. The child here was not adopted by the testator, but by a cousin of the testator.]

Where a person who has adopted a child is making a will, the expression "children" must include adopted children except where a contrary intention is expressed: section 10.

[ROMER L.J. That shows that apart from that case an adopted child would not have been included.]

If one were only applying section 10, it would not be relevant, as this will was not made by the adopter.

[ROMER L.J. You say that this child had the status of a lawful child because of its adoption under the law of British Columbia by reason of section 10?]

By reason of section 7 (c).

Whatever the position at the time of the testator's death, at the death of the tenant for life in 1955 the position of an adopted child in British Columbia was fully equated to that of a natural child. By the amendments made in 1953 the adopted child had unquestionably the full status of a natural child, if it did not have altogether full status before, and any disabilities (if they were disabilities) were thus removed. Since 1953 there were no provisions existing which distinguished his position from that of a natural child, and nothing remained to be done by the Act of 1956 to equate this child's position more fully to that of a natural child.

The position of adopted children under wills is discussed in Theobald on Wills, 11th ed., p. 280; see also Cheshire's Private International Law, 4th ed., p. 400. Before the Legitimacy Act, 1926, in England a foreign legitimated or adopted child could have taken under a will if the child was recognized as such by the law of his domicile: *In re Goodman's Trusts*⁷; *In re Andros*⁸;

⁷ (1881) 17 Ch.D. 266.

⁸ (1883) 24 Ch.D. 637.

Bamgbose v. Daniel.⁹ Adoption and legitimation are the same thing: *In re Fletcher*.¹⁰

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In two recent cases it was suggested that adopted children of foreign domicile could not take under an English will at all: *In re Wilson*¹¹; *In re Wilby*.¹² The present position, where the adopting parent and adopted child are both domiciled in the same country, was left open by Vaisey J. in *In re Wilson*.¹³ His judgment was carried much further in *In re Wilby*,¹⁴ which appears to decide that the courts in this country do not recognize any adoption except that of the English courts.

The effect of that principle would be that if an adopted person wanted to take any interest here in the estate of the adopter or under the will of a third party, the adoption would have to be gone through again in England. Such a proceeding would destroy the comity between nations, and it is doubtful whether our courts would have the jurisdiction to make an adoption order in respect of persons adopted abroad. Moreover, *In re Wilby*¹⁴ is difficult to reconcile with *In re Luck's Settlement Trusts*¹⁵ and *In re Wilson*.¹⁶

The law of adoption is concerned not with property but to exclude the rights of natural parents, and adoption can only be in respect of a person in the jurisdiction. The formal act of adoption is recognized in all countries; it means that the adopted child is brought into the family, so that in substance it is, and has the status of, a child of the family. There has been considerable discussion whether an adopted child takes the domicile of the adopting parents. [Reference was made to Cheshire's *Private International Law*, 4th ed., pp. 174-179; 5th ed., pp. 183-185.] It is not considered that a guardian can change the domicile of a child in his care, but an adopted child is so like a child of the marriage in other respects it would acquire the domicile of the adopter, who is in loco parentis.

The status of an adopted child is a question to be determined in accordance with the law of the child's domicile: *Nataraja Pillai (Decd.) v. Subbaraya Chettiar*.¹⁷

⁹ [1955] A.C. 107; [1954] 3 All E.R. 263.

¹⁰ [1949] Ch. 473, 479; [1949] 1 All E.R. 732.

¹¹ [1954] Ch. 733; [1954] 1 All E.R. 997.

¹² [1956] P. 174; [1956] 1 All E.R. 27.

¹³ [1954] Ch. 733.

¹⁴ [1956] P. 174.

¹⁵ [1940] Ch. 864.

¹⁶ [1954] Ch. 733.

¹⁷ (1949) L.R. 77 I.A. 33.

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[ROMER L.J. The only question, as I see it, is whether the law of the domicile treats the adopted child as a natural child for all purposes.]

It is enough if the position of the adopted child is substantially the same as that of a child of the marriage. In *Purcell v. Hendricks*¹⁸ an adopted child of a legatee took in preference to blood relations of a remoter degree: see also *Robertson v. Ives*.¹⁹

Adoption confers status and is primarily concerned with the relationship between parent and child—custody, education and support, and mutual rights of inheritance with other members of the adopter's family. That status can exist notwithstanding that the adopted child is not in all respects in the same position as a child of a marriage. If it were necessary that the position of an adopted child should be identical with that of a natural child, no adopted child in England could ever take: see section 13 (2) of the Adoption Act, 1950.

At the testator's death in this case those substantial elements existed, but by the death of the widow, which, it is contended, is the relevant date, the differences (if any) were removed, and the appellant's status was fully equated to that of a child of the marriage. The Act of 1955 made certain clarifications in the law, but it conferred no further rights. The words may have been changed but the meaning was not altered.

A. A. Baden Fuller for the respondent defendants. The law governing the construction of the will and succession to the testator's estate is English because it is an English will and the testator was domiciled here; the law governing the status of the appellant is British Columbian. According to the law to be applied in the construction of this will, a child means legitimate child; it does not mean adopted child, who is excluded not because he is not a legitimate child but because he is not a "child."

Whatever status the law of British Columbia may choose to give an adopted child, it cannot make him in England the "child" of Charles Stansfeld Jones.

Alternatively, if the appellant ever acquired the status of a child, he did not do so by the relevant date when the testator died in 1945, or even at the widow's death in 1955.

In England a child could be adopted under the Adoption of Children Act, 1926, but it lost none of its natural rights. It was not until the Adoption of Children Act, 1949, that an English adopted child counted as a child of the adopter for the purpose

¹⁸ (1925) 35 Br.Col.Rep. 516; [1925] 3 D.L.R. 854. ¹⁹ (1913) 15 D.L.R. 122.

of inheritance. In English wills in 1945 the word "children" meant legitimate children and not illegitimate or adopted children: *In re Fletcher*.²⁰ [*Hill v. Crook*²¹ was referred to.]

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The Adoption Act, 1920, of British Columbia does not provide a comprehensive relationship of parent and child; it merely confers particular rights. The words "toward each other" in section 7 (c) meant between the adopting parent and adopted child and no one else; they were intended to be taken literally and to limit the relationship in regard to the rest of the family. That is shown by section 8. That Act does not confer the status of a natural child.

The judge was wrong in his decision that the Act of 1953 conferred on the adopted child the status of a child born in wedlock. That Act merely conferred certain further rights, and that view is confirmed by the Act of 1956. Had the Act of 1953 been intended to have had the far-reaching effect of changing status, it would have used different language—that in the Act of 1956 would have been apt. The Act of 1956 had the effect of making adopted children lawful children for "all purposes"; it is all-embracing and gives the adopted child the status of a natural child. If it be right that the appellant had at no relevant time the status of a natural child the appeal fails on that ground.

On the construction of the will the judge was right in holding that the death of the testator was the relevant date. It has been said that it is elementary law that a class gift remains open until the period of distribution; it is unlikely that the judge overlooked that (as was thought in *In re Stuart*²²); but there is all the difference between a person coming into a class because he is born later and a person coming into a class because some foreign statute comes into force. The judgment would be wrong if it was meant to infer that a class closes at the date of the testator's death, and it must mean that from the point of view of status that it closed. On that construction it is right.

Application of British Columbian legislation of 1948 and 1953 to the will of a testator who died in 1945 would be to make it retrospective, because under English law all gifts under a will come into immediate operation when the testator dies. The British Columbian legislation is not retrospective and, even if it were intended to be retrospective, this court would not so apply it to an English will.

²⁰ [1949] Ch. 473, 479.²² June 28, 1957.²¹ (1873) L.R. 6 H.L. 265.

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[JENKINS L.J. The character of children is fixed once and for all when the testator dies?]

It was held in *Lynch v. Provisional Government of Paraguay*²³ that succession to personal property in England of a person dying domiciled abroad was governed by the law of the domicile of the deceased as it was at the death, without regard to any subsequent changes in that law. That case was accepted in the House of Lords in *Starkowski v. Attorney-General*²⁴; see also *In re Aganoor's Trusts*,²⁵ which points in the same direction, and *London Fan and Motor Co. Ltd. v. Silverman*²⁶ as to legislation not being retrospective. In *In re Luck's Settlement Trusts*²⁷ there was no question as to any change in the law in the future. [*In re Hepworth*²⁸ was also referred to.]

In an English will made in 1945, according to ordinary English usage, the phrase "to the child of X" comprehends two requirements: (1) The person to take must be the child of X, i.e., born by the act of procreation of X; and (2) it must be legitimate according to the law of its domicile: *In re Goodman's Trusts*²⁹; *In re Andros*.³⁰

An adopted child means a "chosen child," and the prefix "chosen" is in contradistinction to child in the ordinary sense. Thus in *In re Donald*³¹ it was held that under a bequest "to the children," in the absence of special circumstances indicating that adopted children were intended to take, only legitimate children came in. *In re Luck's Settlement Trusts*³² is not, as the judge held, a sufficient cause for *In re Donald*³³ not being followed here.

The principle stated in the 5th edition of Dicey's Conflict of Laws, which corresponds to the practice in our courts, is that the status imposed by the law of a person's domicile ought to be recognized in other countries, although the courts of such countries may exercise their discretion in giving effect to the operation of such status: see 5th ed., pp. 28, 535 and 950. This whole subject has now become controversial, and in the 6th edition these passages have been rewritten: see 6th ed., pp. 20, 465, 488, and there is a new chapter on adoption (p. 511). The difference between adoption and legitimation is commented on in Cheshire's

²³ (1871) L.R. 2 P. & M. 268.²⁴ [1954] A.C. 155; [1953] 2 All E.R. 1272.²⁵ (1895) 64 L.J.Ch. 521.²⁶ (1942) 58 T.L.R. 119; [1942] 1 All E.R. 307; [1942] W.N. 56.²⁷ [1940] Ch. 864.²⁸ [1936] Ch. 751.²⁹ 17 Ch.D. 266.³⁰ 24 Ch.D. 637.³¹ [1929] 2 D.L.R. 244.³² [1940] Ch. 864.³³ [1929] 2 D.L.R. 244.

Private International Law, 5th ed., p. 415; see also pp. 408, 410 and 414, and 4th ed., p. 397. The passages written before the subject became controversial are to be preferred.

In *Luck's* case³⁴ the court was considering legitimation by recognition; it would be absurd to apply those principles to adoption. The authorities relating to legitimation should be applied, if at all, with great caution to adoption, for, in contrast to adoption, legitimation is plain and unambiguous: *In re Wilson*.³⁵ In legitimation there is little room for any doubt what is intended; adoption, on the other hand, is a purely artificial relationship; its characteristics are undefined and vary from place to place. It would be strange if children adopted abroad could take under our law as "children." If this appeal succeeds, *In re Wilby*³⁶ cannot stand. *Nataraja Pillai (Decd.) v. Subbaraya Chettiar*³⁷ decided that a widow's capacity to adopt a son to herself was a question of domicile, and there is no quarrel with that decision. *Purcell v. Hendricks*³⁸ and *Robertson v. Ives*³⁹ were overruled by *In re Donald*.⁴⁰ In *In re Brophy*⁴¹ and *In re Pearson*⁴² it was wrongly assumed that *In re Luck's Settlement Trusts*⁴³ applied.

Adoption may confer status of an "adopted child" but not the status of a "child," and the appellant was not a "child" according to English law—the law of the testator's domicile—at the relevant date, which is the date of testator's death. If British Columbian law be relevant, he never, either at the death of the widow or of the testator, had the status of a child born in lawful wedlock to Charles Stansfeld Jones.

Ingress Bell Q.C. in reply. Status is defined in Osborn's Law Dictionary, 4th ed., p. 318, as "... an index to ... legal "rights and duties, powers and disabilities ...". It is discussed by Scott L.J. in his dissenting judgment in *Luck's* case⁴⁴; and Dicey includes the status of parent and child in his enumeration of particular kinds of status. That relationship can be brought about by our own Adoption Act, which uses the words parent and child. It is too fine a distinction to say that adoption confers rights and not status.

As to the argument that the meaning of "child" must be construed at the date of the testator's death, Farwell J. in *Luck's*

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DEC'D., *In re*.³⁴ [1940] Ch. 864.³⁵ [1954] Ch. 733.³⁶ [1956] P. 174.³⁷ L.R. 77 I.A. 33.³⁸ (1925) 35 Br.Col.Rep. 516; [1925]

3 D.L.R. 854.

³⁹ (1913) 15 D.L.R. 122.⁴⁰ [1929] 2 D.L.R. 244.⁴¹ [1949] N.Z.L.R. 1006.⁴² [1946] V.L.R. 356.⁴³ [1940] Ch. 864.⁴⁴ *Ibid.* 889, 890.

C. A. case ⁴⁵ said that the court had to take into consideration all the facts as they were at the date of distribution: see also *In re Stuart*.⁴⁶

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DECD., *In re*.

In the Legitimacy Act, 1926, it was thought necessary to provide in section 3 that legitimation occurring after the date of the will was not a sufficient qualification, implying that otherwise gifts under a will might have vested. In both *Lynch v. Provisional Government of Paraguay*⁴⁷ and *In re Aganoor's Trusts*⁴⁸ the wills had already operated.

It is not possible to get absolute equality in this matter. The main principle is that where a person is recognized by the law of his domicile as a legitimate child, an English will should be construed to include it as a child. If only those cases of adoption are recognized where the position is fully equated to that of an ordinary child, it would appear that such a case would never be found. Where a child is adopted and brought into the family fold, the best description that can be given is "child"; that is in accordance with modern views. It would be inconsistent if an illegitimate child which had been legitimated by subsequent marriage could take and a child formally adopted could not take. The relevant date is that of the death of the widow, and the proper and best description of the appellant at that date was the "child" of Charles Stansfeld Jones, who under the law of his domicile had all the duties of a father toward the appellant.

Cur. adv. vult.

July 30. The following judgment of the court was read by ROMER L.J. [His Lordship stated the facts as set out above and continued:] Inasmuch as Charles Stansfeld Jones predeceased the testator's widow the question is, accordingly, whether the appellant is entitled by substitution to the share of the testator's chattels and residue which his adoptive father would have taken had he survived her. The judge's decision that the appellant is not so entitled was based on the restricted scope of the adoption legislation which obtained in British Columbia in 1945, when the testator died. He would, however, have decided in the appellant's favour if the matter had depended on the law as it stood in the Province when the widow died in January, 1955. His view was, therefore, favourable to the appellant on the issue whether he could in any event be treated

⁴⁵ [1940] Ch. 330, 331.

⁴⁶ June 28, 1957.

⁴⁷ L.R. 2 P. & M. 268.

⁴⁸ 64 L.J.Ch. 521.

as a "child" for the purposes of the testator's will, notwithstanding that he was only a child by adoption, but unfavourable to him on the question whether the appellant's rights and status fell to be decided without regard to the legislation of British Columbia which was passed subsequently to the testator's death.

It was a matter of considerable argument before us, and one on which conflicting authority was drawn to our attention, whether in any circumstances a child of foreign domicile who is adopted by a person of the same domicile, and, in accordance with the law of that domicile, can take under a gift to the child of that person contained in the will of a domiciled Englishman. The judge in the present case summed up his answer to this question as follows¹: "If, therefore," he said, "I had been of opinion that 1955 was the relevant date, I should have held the eighth defendant entitled to share with the first seven because he and his adoptive parent were both domiciled in British Columbia when he was adopted. I am aware that this is not consistent with Barnard J.'s view in *In re Wilby*.² He was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons. It does not prevent the law of the domicile prevailing in cases of legitimation by other means and should not do so, in my view, in cases of adoption which is a kind of legitimation. In any event, *In re Luck's Settlement Trusts*,³ which was apparently not cited to Barnard J., points in this direction, and I think that I ought to follow it."

This view of the judge is largely based upon the application to adoption of principles which have become well established in relation to legitimation by such cases as *In re Goodman's Trusts*⁴ and *In re Andros*,⁵ that is to say, that the relevant inquiry in such cases as the present is as to the status of the adopted child and can only be answered by reference to the domiciliary law of the child and the adopter which, when proved, will be accepted and applied by our courts. This has been regarded as the right approach to the problem in, for example, *Purcell v. Hendricks*,⁶ *In re Brophy*⁷ and *In re Pearson*.⁸ As against this, Mr. Baden

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¹ Ante 263, 273; [1957] 1 All E.R. 549.

² [1956] P. 174; [1956] 1 All E.R. 27.

³ [1940] Ch. 864; 56 T.L.R. 915; [1940] 3 All E.R. 307.

⁴ (1881) 17 Ch.D. 266.

⁵ (1883) 24 Ch.D. 637.

⁶ (1925) 35 Br.Col.Rep. 516; [1925] 3 D.L.R. 854.

⁷ [1949] N.Z.L.R. 1006.

⁸ [1946] V.L.R. 356.

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Fuller argued before us that no adopted child in the position of the appellant can take under a gift in an English will to the "child" of the adopter, however extensive the language of the relevant foreign legislation may be. Mr. Baden Fuller's contention is that (apart from the provisions of the Adoption Act, 1950, which are irrelevant for present purposes) under a gift to the child of A in an English will no one can take unless he can show that he is in fact the child of A, viz., the result of the procreative act of A. The appellant, says Mr. Baden Fuller, was not the child of Charles Stansfeld Jones in this sense and the legislation of British Columbia could not turn him into one. This way of looking at the matter has the unanimous support of the Supreme Court of Canada in *In re Donald*.⁹

In the view which we take of this case it is unnecessary for us to express any concluded opinion on whether the appellant or the respondents are right upon this difficult question and we prefer to refrain from doing so. Before leaving the point, however, we should say that we doubt whether as much guidance upon it is afforded by the decision of this court in *In re Luck's Settlement Trusts*¹⁰ as Harman J. appears to have thought. The *lex domicilii* with which the court was concerned in that case was the law of California, and it is pointed out (rightly as we think) in a footnote in Cheshire's *Private International Law*, 5th ed., p. 408, that "it is important to notice, as F. A. Mann "has shown (57 *Law Quarterly Review* 119), that the Californian "method was not adoption but legitimation by recognition. The "unwary might assume from the judgments in the Court of "Appeal that it was equivalent to adoption in the English "sense." We think there is no sufficient reason to suppose that any of the members of this court were directing their attention to a position such as exists in the present case.

Before stating the reasons which have led us to the conclusion that this appeal must fail it is convenient that we should refer to the legislation regarding adoption in British Columbia. This legislation, in so far as it was drawn to our attention, consists of the Adoption Act, 1920, and certain amendments which were made from time to time thereto. As to the Act of 1920, it is only necessary for present purposes to refer to sections 7, 8 and 10 thereof. Section 7 provides: "Upon the making of the "order of adoption: (a) The natural parents of the minor, and "any previous parent by adoption, and the guardian or person

⁹ [1929] 2 D.L.R. 244.¹⁰ [1940] Ch. 864.

"in whose custody the minor has been shall be divested of all legal rights in respect of the minor, and shall be freed from all legal obligations and duties in respect of the minor as from the date of the order: (b) The minor shall take the surname of the petitioner as his parent by adoption, or such name as the court on the request of the petitioner may order: (c) The parent by adoption and the minor shall sustain toward each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act."

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Then section 8 (1): "As to inheritance and succession to real and personal property, a minor adopted in accordance with the provisions of this Act shall stand in regard to the legal descendants, but to no other of the kindred of his parent by adoption in the same position as if born to that parent in lawful wedlock." Then subsection (2): "No person shall by being adopted lose his rights of inheritance and succession to real and personal property from his natural parents or kindred." Then subsection (3): "If a person adopted dies intestate, his real and personal property received by gift, will, settlement, inheritance, or succession from his natural parents or kindred shall be distributed in the same manner as if no adoption had taken place; and all his other real and personal property shall be distributed in the same manner as if he had been born to his parent by adoption in lawful wedlock."

Then section 10: "The word 'child,' or its equivalent, in a will, grant, or settlement shall include a child adopted by the testator, grantor, or settlor, unless the contrary plainly appears by the terms of the instrument."

By virtue of an amending Act of 1936 the words "or issue" were introduced after "child" where that word appears in the first line of section 10 of the Act of 1920. Subject only to that amendment (which has no bearing on the present case), the rights and obligations arising from legal adoptions in British Columbia at the testator's death in 1945 were governed by the Act of 1920. In 1948, a further amending Act was passed. Sections 9 and 10 of this Act re-enacted, subject to alterations which are not material to the present case, sections 7 and 8 of the Act of 1920. Section 12 provided: "The word 'child' or 'issue,' or its equivalent in a will, grant or settlement shall

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"include an adopted child, unless the contrary plainly appears "by the terms of the instrument." It will be noted that this provision considerably extended section 10 of the Act of 1920 (as amended in 1936) under which the word "child" or "issue" was only to include an adopted child in an instrument executed by the adoptive parent. By a short amending Act of 1953, section 10 (1) of the Adoption Act, 1948, was amended by striking out therefrom the words "the legal descendants, but to "no other of." For the sake of clarity, and as this amendment was of obvious importance, I will read section 10 (1) of the Act of 1948 as so amended: "As to inheritance and succession to "real and personal property, a person adopted in accordance with "the provisions of this Act shall, subject to the provisions of "subsection (2) of section 3, stand in regard to the kindred of "his parent by adoption in the same position as if born to that "parent in lawful wedlock."

The above legislation, consisting of the Act of 1920 and the amending Acts of 1936, 1948 and 1953, was that which was in force in British Columbia in January, 1955, when the testator's widow died. In March, 1956, a further Act was passed. This amended the Act of 1948 by striking out sections 9 and 10 and substituting (so far as relevant for present purposes) the following section 9 (1): "For all purposes an adopted child becomes "upon adoption the child of the adopting parent, and the "adopting parent becomes the parent of the child, as if the "child had been born to that parent in lawful wedlock." Then subsection (2): "For all purposes an adopted child ceases, upon "adoption, to be the child of his existing parents (whether his "natural parents or his adopting parents under a previous "adoption), and the existing parents of the adopted child cease "to be his parents." Then subsection (3): "The relationship "to one another of the persons (whether the adopted person, the "adopting parents, the natural parents or any other persons) "shall be determined in accordance with subsections (1) and (2)."

Without deciding the question one way or the other, we are prepared to assume in the appellant's favour, for the purposes of this appeal, that a child who has been adopted under the law of his domicile is not of necessity precluded from taking a gift in an English will to the "child" of his adoptive parent by reason only of the fact that he was not procreated by the adopter. But the making of the assumption necessarily involves attributing to the testator, in using the word "child," an intention different from that which he is presumed by our courts to have. It is

established beyond controversy that when an English testator speaks of "the children" of A he is *prima facie* taken to be referring, and referring only, to those persons of whom it can be postulated that they are the lawful children of A. The rule is clearly stated in Hawkins on Wills, 3rd ed., at p. 102. Further than, and by analogy to, this we agree with the view which Roxburgh J. expressed in *In re Fletcher*¹¹ to the effect that adopted children are *prima facie* excluded by the rule equally with illegitimate children. If, then, a different intention is to be attributed to a testator, so far as adopted children of foreign domicile are concerned, the rule should not be departed from, in our judgment, further than is necessary; and it is neither permissible nor possible to suppose that the testator intended to bring into the category of children all persons who have been adopted under the *lex domicilii*, however limited the effect of their adoption may be. It seems to us that only those who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation. Such a position was conferred by the amending Act of British Columbia which was enacted in 1956. That Act, however, cannot avail the appellant on any view of the matter, for the date of distribution was already past; and it is necessary, therefore, to inquire whether the earlier legislation was sufficient in its effect to enable the appellant to succeed.

As a preliminary to this inquiry the question arises whether the relevant legislation was that which existed in 1945, when the testator died, or whether account should also be taken of the amendments which were introduced after the testator's death but before the death of his widow 10 years later. The judge held that the relevant legislation was the Act of 1920 as amended in 1936 and that the subsequent amendments do not affect the matter. We agree with the judge in this conclusion, although he expressed it in language which is perhaps open to some misunderstanding. He is reported to have said¹²: "Now, in my judgment, 1945, the testator's death, and not 1955, the widow's death, is the relevant date. It is true that interests in remainder after her death did not vest until that event. Nevertheless, it seems to me that the class of persons capable of taking must be capable of ascertainment when the will first

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DECD., *In re*.¹¹ [1949] Ch. 473, 479; [1949] 1¹² Ante 270.

All E.R. 732.

C. A. "comes into operation. The eighth defendant was not then such
1957 "a person."

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It might be thought from this, as indeed it was thought in *In re Stuart*,¹³ which was decided last month in the Supreme Court of British Columbia by Whittaker J., a copy of whose judgment was made available to us, that the judge was overlooking the well-established rule that under a gift to A for life with remainder to the children of B then living, all the children of B who are living at the death of A will take, whether born in the lifetime of the testator or not. We are well persuaded that the judge was not intending to negative this elementary proposition. What, in our opinion, the judge was saying was that the legal status upon which the capacity of members of the class who would or might take in the future depended was to be determined once and for all by reference to the state of affairs which existed at the testator's death. It appears to us that this is plainly right. On the hypothesis, accepted for the purposes of this judgment, that the testator may be taken to have intended to include in his reference to children persons who achieved by adoption the rights and status which we have indicated above, we are unable to attribute to him the intention of extending his benevolence to persons who did not acquire such rights and status until after his death. The contrary view would lead to most surprising and inconvenient results. Supposing that in the present case C. S. Jones had in fact had a child of his own when the testator died. Such a child would know that, under the rule of construction to which we have referred, he would have to share the beneficial interest given to C. S. Jones' children with any brothers and sisters that might be born before the date of distribution. But is it to be supposed that the testator intended that such a child would also have to share his interest with any children, however many there might be, whom his father chose to adopt during the lifetime of the testator's widow? And is an intention to be attributed to the testator that, upon the same supposition, C. S. Jones' own child would have to share his interest with an adopted child who, at the testator's death, had only limited rights of succession but who became entitled by subsequent (albeit retrospective) legislation to the full rights and status of a child of the adoptive father? We cannot but think that each of these questions requires a negative answer. It may well be that a child, illegitimate at the testator's death,

¹³ June 28, 1957.

who was legitimated subsequently under legislation in force in the testator's lifetime, would be held to qualify; but that is because there existed in the child, from the moment when the will came into operation, the potentiality of achieving the requisite status. But a child who, at the testator's death, was unadopted or who, though adopted and possessing limited privileges, could only hope to attain the necessary status if it were to be conferred by subsequent legislation cannot be said to enjoy any comparable potentiality. Accordingly, we think that so far as adopted children are concerned their status and capacity to take under a gift to "children" in an English will is (subject, of course, to British legislation) fixed once and for all at the testator's death and that subsequent legislation in the country of their domicile enlarging their rights is to be disregarded. This view would appear to be consonant with principles of long standing in relation to succession. In *Lynch v. Provisional Government of Paraguay*¹⁴ Lord Penzance said¹⁵: "The general proposition that the succession to personal property in England of a person dying domiciled abroad is governed exclusively by the law of the actual domicile of the deceased was not denied; but it was affirmed by the plaintiff that this proposition had relation only to the law of the domicile as it existed at the time of the death of the individual in question, and that no changes made in that law after the date of the death can by the law of this country be recognized as affecting the distribution of personal property in England. This contention appears to be well founded." Lord Penzance added that the position would be the same even though the subsequent foreign legislation had a retrospective effect. This case was followed in *In re Aganoor's Trusts*,¹⁶ and was referred to without disapproval by some of their Lordships in the recent case of *Starkowski v. Attorney-General*.¹⁷

Mr. Ingress Bell was concerned to argue that the relevant time for ascertaining the appellant's status under the law of British Columbia was the date of distribution. He said (and rightly) that support for that view is to be found in the judgment of Farwell J. in *In re Luck's Settlement Trusts*.¹⁸ With regard to that, however, it is to be observed, first, that the decision of Farwell J. was reversed on appeal and, secondly (as already stated), that the question in that case was one of legitimation

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DECD., *In re*.¹⁴ (1871) L.R. 2 P. & M. 268.¹⁵ *Ibid.* 271.¹⁶ (1895) 64 L.J.Ch. 521.¹⁷ [1954] A.C. 155; [1953] 2 All E.R. 1272.¹⁸ [1940] Ch. 864.

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rather than one of adoption. Support is also lent to Mr. Ingress Bell's contention by *In re Stuart*,¹⁹ in which adoption legislation passed after the testator's death but prior to the date of distribution was regarded as relevant to the determination of a question similar to that in the present case. For the reasons, however, which we have stated we are of opinion that, in considering the appellant's claim to share in the testator's estate as a "child" of C. S. Jones, regard must be had to the Adoption Acts of 1920 and 1936 and to those alone.

On that assumption we are clearly of opinion that the judge's disallowance of the appellant's claim was right. The construction and effect of a foreign statute depends, of course, on the law of the country in which it was enacted, and this is treated in our courts as a question of fact. No evidence was given in these proceedings by a qualified expert as to the construction which would be placed on the Adoption Acts of British Columbia by the courts of that province. Nevertheless, the parties were in agreement before us that we should approach the construction of these Acts as though they were British Acts of Parliament. There is, we think, no difficulty in construing them on this footing, couched as they are in the English language and containing no terms of art or expressions which are unfamiliar to us. On the construction, then, of the Act of 1920, as amended in 1936, it is quite clear to us that such rights and privileges as it conferred upon adopted persons fall far short of those which characterize the status of a child. It is true that under section 7 of the Act the natural parents of an adopted child are divested of all legal rights in respect of him and are freed from all legal obligations and duties towards him; and that after the adoption the parent by adoption and the minor are to assume toward each other the legal relation of parent and child, and to have all the rights and be subject to all the obligations and duties of that relationship. But in matters of inheritance and succession the rights of the adopted child were to be of a very limited character. In such matters it was only "in regard to the legal descendants" "but to no other of the kindred of his parents by adoption" that a child was, by section 8 (1), to stand in the same position as if born to that parent in lawful wedlock; and by section 10 it was only in a will, grant or settlement executed by the adoptive parent himself that the word "child" was to include an adopted

¹⁹ June 28, 1957.

child in the absence of a contrary intention, and not in instruments executed by other persons. It appears to us to be quite impossible to suppose that an English testator, in a bequest to "children," could have in contemplation adopted children with such limited rights as these.

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That view of the matter is sufficient to dispose of the appeal and it becomes unnecessary to decide whether the appellant would have succeeded if his position were governed by the Act of 1953. The judge was of opinion that he would. "In 1953, however,"²⁰ said the judge, "section 10 of the Act of 1948, which in effect repeated section 9 of the Act of 1936, was amended by striking out the words 'the legal descendants but to no other of.' The effect of this was that an adopted person stands in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock. If, therefore, the British Columbian legislation is to be followed in England and the relevant date is the death of the widow, the eighth defendant would be entitled to succeed."

We are not altogether sure of this. The amendment to which the judge referred did undoubtedly advance the position of adopted children considerably beyond that enjoyed under the earlier legislation. Nevertheless it still fell a good deal short of the status of a child in the true sense; and it was not until the Act of 1956 was passed that the difference between the two categories of children was reduced to vanishing point. It was argued before us by Mr. Ingress Bell that the Act of 1956 added nothing of material significance to its predecessors, but it does not seem to us that this is correct. For example, one effect of section 9 (1) of the Act of 1956, would appear to be that an illegitimate child becomes legitimated if it is adopted by its parent, a result which would not have been achieved under the earlier law. Again, if the domicile of origin of an adopted infant is different from that of the adopter's domicile, it may well be that the child's domicile would be regarded thenceforth as that of the adoptive parent if adoption was effected under the later Act; but no such change would have been effected under the provisions of the previous legislation. Accordingly, we entertain some doubt whether a person in the position of the appellant could in any event be regarded as possessing the requisite status of a "child" of C. S. Jones for the purposes of an English will unless the

²⁰ Ante 271.

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order for his adoption had been made since the passing of the Act of 1956. It is not, however, necessary to decide this, and we refrain from doing so.

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The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Knapp-Fishers; Candler, Stannard & Co.; McMillan & Mott.*

I. G. R. M.

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May 21,
22, 23.

In re HAYWARD, DECD.

KERROD *v.* HAYWARD AND ANOTHER.

[1955 H. 1726.]

Jenkins and
Sellers L.J.J.
and Vaisey J.

Advancement—Portion, by way of—Intestacy—“By way of advancement”—Nomination of substantial sum by intestate father to married son aged 43—Distribution of father’s estate—Whether “by way of advancement”—Administration of Estates Act, 1925 (15 & 16 Geo. 5, c. 23), s. 47 (1) (ii) (iii).

An intestate died in 1949, having, in 1946, made nominations amounting to £507 odd in favour of his elder son, who was then aged 43, married but with no child, and employed as a civilian clerk in the War Office. The nominations operated as dispositions in favour of the son taking effect on the father’s death but revocable meanwhile. The value of the estate, exclusive of the nominations, was about £1,780. In an administration action, the question was raised whether the elder son’s executors ought, in the administration of the intestate’s estate, to bring into account the £507 odd as having been paid to the elder son “by way of advancement” within the meaning of section 47 (1) (iii) of the Administration of Estates Act, 1925¹:—

¹ Administration of Estates Act, 1925, s. 47 (1): “Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:— . . . (ii) The statutory power of advancement . . . shall apply . . . (iii) Where the property held on the statutory trusts for issue is divisible into shares,

“then any money or property which, “by way of advancement or on the “marriage of a child of the intestate, “has been paid to such child by the “intestate or settled by the intestate “for the benefit of such child (including any life or less interest and “including property covenanted to be “paid or settled) shall, subject to “any contrary intention expressed or “appearing from the circumstances of “the case, be taken as being so paid “or settled in or towards satisfaction

Held, that though the sum in question was quite large when compared with the total assets of the estate at the time when the nominations were made, it was not sufficiently large by itself to raise the presumption of advancement, having regard to the age of the son and to the absence of evidence as to the purposes for which the nominations were made.

Taylor v. Taylor (1875) L.R. 20 Eq. 155, *In re Lacon* [1891] 2 Ch. 482; 7 T.L.R. 457, *In re Scott* [1903] 1 Ch. 1 and *In re Livesey* [1953] 1 W.L.R. 1114; [1953] 2 All E.R. 723 considered.

Per curiam. By virtue of the language of section 47 (1) (iii) of the Act of 1925 it is not every settlement the benefits taken under which must be brought into account, but the settlement must be either by way of advancement or on the marriage of the child concerned, so that in the present case if one regarded the nominations as equivalent to a settlement, that could not conclude the matter; it is necessary still to see whether the disposition was in the nature of an advancement. Further, in order to raise a *prima facie* case for accounting, it must be shown that the fund in question was sufficiently substantial in itself to be in the nature of a permanent provision without pressing too far the question of proportion. If that were not so an intestate who had only £50 in the world, £25 in cash and £25 in National Savings certificates, could properly be held to be making a permanent provision for one of his sons by giving him a nomination in respect of the certificates because they represented no less than half of his estate, although the sum given would in itself be trifling.

Decision of Upjohn J. [1956] 1 W.L.R. 1490; [1956] 3 All E.R. 608 affirmed.

APPEAL from Upjohn J.²

On October 31, 1946, Frank Charles Hayward (hereinafter called "the intestate") nominated in favour of his elder son, Frank Cyril Hayward, £315 15s. 6d. National Savings Certificates standing in the intestate's name and, on November 21, 1946, he further nominated in his favour £191 17s. 11d. standing to the intestate's credit in the Post Office Savings Bank. The elder son was at the time 43 years of age; he was married but had no child, and he was employed as a civilian clerk in the War Office.

On December 11, 1949, the intestate died, having by his will left all his property to his wife, who predeceased him. He was survived by the elder son and a younger son, who was the defendant to these proceedings and he had not revoked the nominations, so that the nominated sums vested in the elder son. On

"of the share of such child or the
"share which such child would have
"taken if living at the death of the
"intestate, and shall be brought into
"account, at a valuation (the value
"to be reckoned as at the death of

"the intestate), in accordance with
"the requirements of the personal
"representatives . . ."

² [1956] 1 W.L.R. 1490; [1956]
3 All E.R. 608.

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April 13, 1950, the elder son applied for a grant of administration with the will annexed, but the younger son entered a caveat thereto. On August 11, 1951, the elder son died and, on November 22, 1951, administration to the intestate's estate was granted to the younger son.

By originating summons dated May 19, 1955, the plaintiffs, who were the elder son's executors and had received the nominated sums, commenced an action for the administration of the intestate's estate. On July 18, 1955, an order was made for accounts and an inquiry and, on July 9, 1956, the master made his certificate, certifying that the intestate's only property was £1,779 8s. 1d., and that that amount was due from the defendant. The question arose whether, in the distribution of the intestate's estate, the sum of £507 13s. 5d., being the amount of the Savings Certificates and the Post Office Savings Bank account which had been nominated, ought to be brought into account by the elder son's estate; and it was on that issue that the matter came before the court on further consideration. The elder son's executors, the plaintiffs, contended that the sums in question ought not so to be brought into account and accordingly asked that the defendant be ordered to make payment into court without taking them into account.

Upjohn J. decided in favour of the plaintiffs.

The defendant appealed.

Miss J. Graham Hall for the defendant. The nominations were made pursuant to the provisions of the Savings Certificates Regulations, 1933 (1933 S.R. & O. 1149), and the Post Office Savings Bank Regulations, 1938 (1938 S.R. & O. 556): see articles 12, 15 and 17 of the Regulations of 1933, and articles 30, 31 and 32 of the Regulations of 1938. Since the nominations were never revoked they devolved on the elder son upon the father's death. The sum in question ought to be brought into account by the plaintiffs as having been paid to the elder son "by way of "advancement" within the meaning of section 47 (1) (iii) of the Administration of Estates Act, 1925. Reliance is placed on *Taylor v. Taylor*³ in support of the propositions: (a) in considering whether or not there has been an advancement the age of the child in question is irrelevant; (b) where there is payment by a father to a child of a large sum and there is no evidence to show the reason for such payment and, furthermore, such sum

³ (1875) L.R. 20 Eq. 155, 157, 158.

represents a substantial portion of the father's estate, such a payment amounts to an advancement. Where, as here, there are no surrounding circumstances to throw light on the reason for the gift, the presumption it is by way of advancement cannot be rebutted: see section 47 (1) (iii) of the Act of 1925. It is also submitted that the doctrine that equity leans against double portions applies in the present case.

In *In re Scott*⁴ the fact that the son was in middle life did not preclude him from being a "child" for the purposes of advancement. Further, the testator's estate was estimated to be in the region of £200,000 to £250,000; nevertheless, the sum there in question, £5,000, was described by the Court of Appeal⁵ as a large sum of money. Strong reliance is placed on the observation of Stirling L.J. in *In re Scott*⁶ that *prima facie* the gift of a substantial sum of money, in the absence of any evidence showing the purpose for the payment in question, is to be deemed to be an advancement.

It is true that the law relating to accounting for advancements was before 1926 based on the Statute of Distribution, 1670, s. 5, but it would seem that section 47 (1) (iii) of the Administration of Estates Act, 1925, was not seeking to alter the nature of the provisions of the earlier section but merely to express them in more modern language: see Williams on Executors and Administrators, 13th ed., vol. 2, pp. 896, 911, where it is stated that section 5 of the Statute of Distributions, 1670, was designed to produce equality among the children, and that to construe section 47 (1) (iii) of the Act of 1925 it is necessary to refer to the old cases on the earlier statute.

In the alternative, it is submitted that since a nomination is in its nature akin to a will, there was, in the circumstances of the present case, a partial intestacy, and, accordingly, the sum in question must be brought into account by the plaintiffs pursuant to section 49 (a) of the Administration of Estates Act, 1925. [Reference was also made to *Edwards v. Freeman*,⁷ *In re Lacon*⁸ and *In re Livesey*.⁹]

E. F. R. Whitehead for the plaintiffs. The wide language of section 47 (1) (iii) of the Administration of Estates Act, 1925, is to be contrasted with that of section 49 (a) of that Act. In the case of partial intestacy section 49 (a) requires the issue of the

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⁴ [1903] 1 Ch. 1, 4, 9.⁵ *Ibid.* 10, 13, 16.⁶ *Ibid.* 13.⁷ (1727) 2 P.Wms. 435, 441, 442.⁸ [1891] 2 Ch. 482, 497, 498.⁹ [1953] 1 W.L.R. 1114.

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deceased to bring into account *any* beneficial interest acquired by them under the will. On the other hand, the language of section 47 (1) (iii) is very restrictive, for it is only advancements in the strict sense (other than settlements on marriage) which have to be brought into account. If trustees, for example, are contemplating making an advancement, they must have a distinct object in view, such as setting up the child in business or in a profession, and it is not enough that they consider that the child should have some money to "jingle in his pocket." It follows, therefore, that in considering whether a gift was an advancement, as a matter of logic it cannot be assumed that the gift was an advancement *per se* merely because the sum given was substantial. *Taylor v. Taylor*¹⁰ is distinguishable as being a decision under section 5 of the Statute of Distribution, 1670, the language of which is significantly different from that of section 47 (1) (iii) of the Act of 1925. *In re Scott*¹¹ is also distinguishable on the ground that it relates to the rule against double portions.

If it be held that the gift of a substantial sum raises a presumption of advancement, then it is submitted that there is an initial presumption that the sum in question was paid for one of the particular purposes which the law recognizes as capable of constituting an advancement. The burden of proof is on the person seeking to show that the gift was given by way of advancement: see *per* Roxburgh J. in *In re Livesey*.¹²

Section 5 of the Statute of Distribution concerns accounting for advancements by way of portion, and it is emphasized that *In re Scott*¹³ was a decision on the rule against double portions. But different considerations arise in those circumstances, which differ from those in the present case, because that section is concerned with a person obtaining in advance that which he would otherwise have received on an intestacy. Section 47 (1) (iii) of the Act of 1925 is significantly narrower in the scope of its language. If in that section the word "advancement" meant the same as an advancement by portion within the rule against double portions, it would have been unnecessary in section 47 (1) (iii) to refer to "marriage," since any gift to the child on marriage would be a portion for the purposes of that rule. It is only advancements in the strict sense that have to be taken into account for the purposes of satisfaction.

In the present case there are no circumstances which would entitle the court to hold that the gift of the sum in question to

¹⁰ L.R. 20 Eq. 155.¹¹ [1903] 1 Ch. 1.¹² [1953] 1 W.L.R. 1114, 1119.¹³ [1903] 1 Ch. 1.

the elder son constituted an advancement. If it be held that there is a presumption of advancement where the sum in question is large, then it is submitted that this was not a large sum; it was the aggregate of two separate gifts which amounted to a little over £500. If, as is submitted, advancement is the making of immediate provision for a child to establish him in life, for a father to make such provision by way of nominations would seem most unlikely, since a nomination only takes effect on the death of the nominator and can be revoked by him in his lifetime.

Miss Graham Hall in reply. The fact that the subject-matter of the gift is payable in futuro does not vitiate against the sum in question being given by way of advancement: *Edwards v. Freeman*.¹⁴

JENKINS L.J. stated the facts and continued: The point at issue in this appeal, which the judge decided in favour of the plaintiff executors, is whether under the provisions of section 47 (1) (iii) of the Administration of Estates Act, 1925, the value of the National Savings Certificates and Post Office Savings Bank balance ought to be brought into account against the elder son in the distribution of the estate on intestacy, the distribution apart from that question being a simple distribution equally between the two sons. The dispositions by way of nomination carried out by the testator with respect to the Savings Certificates and the Post Office Savings Bank balance were special forms of disposition authorized in respect of such certificates and such balances by certain statutory rules and orders to which we were referred. Put very shortly, the effect of a nomination is that it operates as a disposition in favour of the nominee taking effect on the death of the nominator and revocable by the nominator at any time in his lifetime. Such a distribution, therefore, partakes to some extent of the nature of a revocable settlement where the settlor, represented by the father in this case, makes a provision for a child to take effect on the settlor's death and in the meantime revocable by the settlor.

The net estate of the father, apart from these amounts of Savings Certificates and Post Office Bank balance, amounted to £1,779 8s. 1d. At the period of the nomination the elder son was aged 43; he was married but had no child and he was employed as a civilian clerk in the War Office.

These, I think, are the whole of the facts in the possession of the court, and for the purpose of reaching any decision on the

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¹⁴ 2 P.Wms. 435, 445.

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point at issue, they are meagre indeed. We have the bare facts of these two nominations; we have the fact that they amounted in all to some £500, and we have the fact that the net estate exclusive of the nominated assets amounted to only £1,779 8s. 1d., which shows that the amounts nominated, though not in themselves to be classed as very large sums as money goes nowadays, were nevertheless no inconsiderable proportion of the father's estate. If one treats the estate for purposes of calculation as including the amounts in question, the proportion would be between one-quarter and one-fifth or something of that order, I think.

These being the facts, are the certificates and the bank balance to be brought into account under section 47 (1) (iii) of the Administration of Estates Act, 1925? That provision reads: [His Lordship read the sub-paragraph and continued:] It is upon the true construction of that provision that the present case must turn. It is a provision with a long history behind it in that it takes the place of the provisions for accounting for advancements by portion contained in the Statute of Distribution, 1670. By that Act (section 5) "the whole surplusage" of the estate of an intestate was to be divided "in manner and form following: that is to say: (2) One third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made;" Then by subsection (3): "and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated."

It will be seen that these provisions treat the interests taken by the children on an intestacy as portions, and the children are

required to bring into account any sums representing advances by portion made to them respectively. It will be seen that the present provision, the provision in section 47 (1) (iii) of the Administration of Estates Act, 1925, radically departs from the language of the Statute of Distribution containing as it does no reference at all to portions save in so far as a reference to portions is to be imported by implication from the use of the word "advancement." To my mind section 47 (1) (iii) of the Administration of Estates Act, 1925, is, if anything, narrower than the provisions of the Statute of Distribution, but decisions upon the old Act are, I think, generally speaking, applicable to the new.

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The earliest case to which we were referred was *Edwards v. Freeman*,¹ in which I find this passage: "The occasion of making the Statute of Distribution, was to put an end to the long contest which had been betwixt the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a prohibition, being of opinion that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them, and the Act intended to make the children's provision equal, which was agreeable to the civil law, where goods movable and immovable (i.e. lands) are considered as the same, though our law would never let the civil law meddle with lands. In *Swinburne* 165, it is said, that if a father by deed settle an annuity on his child, to commence after his death, this is an advancement pro tanto; and by the same reason, a reversion settled on a child, as it may be valued, is an advancement also."

The next case, which is the leading case on this topic and has been referred to over and over again where questions of this sort arise, is *Taylor v. Taylor*.² It was a case of intestacy. The headnote reads: "An 'advancement by portion' within the meaning of section 5 of the Statute of Distribution is a sum given by a parent to establish a child in life or to make a provision for the child. Sums given for the following purposes: (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar;

¹ (1727) 2 P.Wms. 435, 441, 442.² (1875) L.R. 20 Eq. 155.

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“(2) the price of a commission and outfit of a child entering the army; (3) the price of plant and machinery and other payments for the purpose of starting a child in business:—Held, ‘advancements by portion.’ Sums given for the following purposes: (1) payment of a fee to a special pleader in the case of a child intended for the Bar; (2) price of outfit and passage money of an officer in the army and his wife on going out to India with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his housekeeping and other expenses:—Held, not “advancements by portion.”

In the first of two judgments delivered by him in the case *Jessel M.R.* said³: “I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock-in-trade; all these things I understand to be portions or provisions. Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose. But I do not think that these words ‘by portion’ are to be disregarded, nor is the word ‘advancement’ to be disregarded. It is not every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shewn to be that which everyone would recognize as being for establishing the child or making a provision for the child.”

In the second judgment the Master of the Rolls said⁴: “nothing could be more productive of misery in families than if he were to hold that every member of the family must account strictly for every sum received from a parent. According to his view, nothing was an advancement unless it were given on marriage, or to establish the child in life.

³ L.R. 20 Eq. 155, 157.

⁴ *Ibid.* 158.

“Prima facie, an advancement must be made in early life; but any sum given by way of making a permanent provision for the child would come within the term establishing in life.” Then he said: “The entry money at the Middle Temple was clearly for the establishment of the child, and must be accounted for.” Then he referred to some of the other payments and he went on: “Again, the sums paid for debts in India appeared to be in the nature of temporary assistance; thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement; but a sum given merely to assist him temporarily would not. The sum given to pay the debts in India therefore need not be accounted for.” On the other hand, he held that “the payments in respect of the mining operations in Wales appeared to have been made for starting the plaintiff in business, and ought to be accounted for.”

That is a very well-known case, and those two short judgments of Sir George Jessel have always been regarded, I think, as the nearest approach to a definition of what is an advancement that our case law has achieved. There are one or two other points to which I should especially refer. The Master of the Rolls said⁵: “Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him.” I call attention to that because Miss Hall, for the appellant, relied on the relatively substantial amount of the value of the certificates and the bank balance here in question as compared with the total estate of the father.

Then the Master of the Rolls said⁵: “In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shewn to be that which everyone would recognize as being for establishing the child or making a provision for the child.”

Now it seems that under the Statute of Distribution any provision made for a child by way of settlement was looked upon as an advancement by portion, and it seems to me that that is recognized by the language of the Master of the Rolls to which I have just referred. But we have to apply the terms of section 47 (1) (iii) of the Administration of Estates Act, 1925, and the language of that enactment seems to me to show that it is not every settlement the benefits taken under which must be brought

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⁵ L.R. 20 Eq. 155, 158.

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into account, but the settlement must be either by way of advancement or on the marriage of the child concerned. So that in this case if one regards the nominations as equivalent to a settlement, that cannot conclude the matter; it is necessary still to see whether the disposition was in the nature of an advancement.

I would particularly refer again to this in the second judgment of the Master of the Rolls⁶: "According to his view, nothing "was an advancement unless it were given on marriage, or to "establish the child in life. Prima facie, an advancement must "be made in early life; but any sum given by way of making a "permanent provision for the child would come within the term "establishing in life." So "prima facie an advancement must "be made early in life." One must note in relation to this consideration that the elder son at the date of these nominations was 43 years old. Then there is the question whether the subject-matter of the relevant dispositions in the present case was given by way of making a permanent provision for the elder son. That is a matter to which I will return.

I do not wish to burden this judgment by unnecessary citations from well-known authorities, but in view of the course taken by the argument I should, I think, refer to the judgment of Bowen L.J. in *In re Lacon*.⁷ It is to be observed as regards this authority that it does not deal with the case of an intestacy; it is a case of the application of the rule against double portions in its strict sense, that is to say, a case where a testator made a will disposing of property in favour of his children in a certain way, and the question arose whether a benefit given to a particular child after the date of the will must be brought into account under the rule against double portions. Of course, that doctrine proceeds on the ground that the testator in making his will has prima facie set out his ideas of equality or fairness as between his children; it is not necessarily mathematical equality that is concerned. The testator is taken to have set out his intentions on that subject in his will, and accordingly if an advancement by way of portion is made to a child between the date of the will and the date of the death, then, unless the contrary is shown, it must be brought into account, so as not to disturb the intended scheme of division.

⁶ L.R. 20 Eq. 158, 159.

⁷ [1891] 2 Ch. 482, 497; 7 T.L.R. 457.

Bowen L.J. said⁸: "Accordingly, in order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion: it is said that, whatever gifts are made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have, therefore, to ask ourselves, in the first place, were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion? But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend.

"This, like the former, is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest. Circumstances may show (to put it in different language) that equality was not the intention of the father."

There Bowen L.J. is saying, in effect: you must find a will which leaves a child a portion and you must find some subsequent gift to the child in the nature of a portion; until you find a gift in the nature of a portion made to the child *inter vivos*, no question of double portion arises, but where you do find there is a gift in the nature of an advancement, then the further question arises whether that is intended to be given by way of anticipation of the child's interest under the will, and on that

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⁸ [1891] 2 Ch. 482, 497, 498.

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aspect of the matter there is a presumption in the affirmative which can be rebutted by showing that the parent did not intend the gift in question to be by way of anticipation of the benefit under the will, but intended it to be additional.

The law on this subject is rendered less easy to follow, as I think, by the circumstance that "advancement" seems to be used in two ways. First, there is the typical gift by way of advancement for establishing a child in life, and the child there is spoken of as being advanced because he is forwarded in life and made to stand better with the world. On the other hand, the word "advancement" is sometimes used in relation to the second branch of Bowen L.J.'s observations, that is to say, as being an advancement or anticipation of the interest under the will or, in cases like the present, the interest taken under the intestacy. Be that as it may, the first thing that has to be established in any case of this kind is that the gift, which it is said should be brought into account, was in itself in the nature of an advancement by portion.

I have only one other citation to make from the authorities and that is *In re Scott*.⁹ I will not go into the facts of that case; I will confine myself to referring to certain passages in the judgment on which Miss Hall relied. Vaughan Williams L.J. said¹⁰: "Now, with regard to the son John the gift, or what—ever it may be called, of this sum of £5,000—a large sum of "money—bears so much the characteristics of a portion that, "in the absence of anything to rebut the conclusion, we ought, "I think, to assume that the first of the presumptions mentioned "by Bowen L.J. applies." There Vaughan Williams L.J. founded himself partly on the size of the sum of money in question and he described £5,000 as a large sum of money. Then Stirling L.J. said¹¹: "I shall assume that this sum of £5,000, "being a large one, would, in the case of an ordinary estate, "be prima facie taken to be an advance within the rule against "double portions." Finally, Cozens-Hardy L.J. said¹²: "I "agree with him"—that was with counsel—"that, if nothing "more had been known than that such a large sum as £5,000 "had been given to a child by his father in the interval between "the date of his will and that of his death, there would be a "presumption, which in that case would not be rebutted, that "it was to be taken by the child in partial satisfaction of the "provision made for him by the will." Then the Lord Justice

⁹ [1903] 1 Ch. 1.¹¹ *Ibid.* 13.¹⁰ *Ibid.* 10.¹² *Ibid.* 16.

went on to discuss this aspect of the matter and he said ¹³: "We are dealing here with a very wealthy man, whose estate was worth £200,000 or £250,000."

I should mention that we were also referred to the recent decision of Roxburgh J. in *In re Livesey*.¹⁴ All I have to say about that case is that it seems to me to have turned upon the language of the particular document and I do not think any assistance is to be found in it for the purposes of the question which we have now to decide.

Returning to section 47 (1) (iii) of the Administration of Estates Act, 1925, the question is whether the certificates and the bank balance in this case were "any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child." It is, I think, clear, as I have already indicated, that the words "has been paid to such child by the intestate or settled by the intestate for the benefit of such child" are governed by the words "by way of advancement or on the marriage of a child"; so that it is indispensably necessary to the appellant's success in the present case, a gift on the occasion of marriage not being here in question, that the court should be able to say that these dispositions, whether one terms them payments or settlements, were made by way of advancement. Jessel M.R. indicated in *Taylor v. Taylor*¹⁵ the kinds of payment which should be regarded as advancements by portion for the purposes of this provision. The difficulty in the way of the appellant is the complete absence of evidence as to the circumstances in which these nominations were made. We have no information whatever except the age of the elder son, which was 43, and, therefore, "prima facie," as Sir George Jessel said, against the view that there was an advancement. We have no evidence as regards the elder son's means or needs at the time; we have nothing whatever to throw any light upon the matter. The only purpose in the way of advancement that can here be collected is the general purpose of making a permanent provision for the elder son so as to come within the words of Sir George Jessel "that any sum given by way of making a permanent provision for the child would come within the term of establishing in life." Can one say, on the bare fact of these nominations having been made, that they were made by way of permanent

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¹³ [1903] 1 Ch. 1, 17.¹⁵ L.R. 20 Eq. 155.¹⁴ [1953] 1 W.L.R. 1114.

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provision for the elder son? There is nothing to aid us to that conclusion except the size of the fund. As I have already indicated, the fund in itself is not large as the value of money goes today, but it is no inconsiderable portion of the whole amount that the father had to dispose of. Is it then, regarding the matter relatively as well as absolutely, a large enough sum to make it possible for this court to say, *prima facie*, this was an advancement by way of permanent provision for the elder son and it must, therefore, be brought into account unless the presumption to that effect can be rebutted? There being no rebutting evidence, the matter could in that event be decided on the presumption the other way, that is to say, the presumption to the effect that the giving of this relatively large amount, if unexplained, must be taken to have been an advancement.

I have found this case a difficult one and I agree with Upjohn J.'s description of it as a borderline case, but giving the best consideration to the matter that I can, I cannot regard these Savings Certificates and this bank balance, given as they were on two separate occasions, albeit the dates were close together, as constituting a fund of such size or importance, even when considered in relation to the intestate's other assets, as to be capable of being described as *prima facie* constituting an advancement. I appreciate the force of Miss Hall's argument based on relative values, but it does not seem to me that this should be carried too far. I think, in order to raise a *prima facie* case for accounting, it must be shown that the fund in question was sufficiently substantial in itself to be in the nature of a permanent provision without pressing too far the question of proportion. If that were not so, an intestate who only had £50 in the world, £25 in cash and £25 in National Savings Certificates, could properly be held to be making a permanent provision for one of his sons by giving him a nomination in respect of the certificates because they represented no less than half his estate, although the sum given would in itself be trifling.

For these reasons, which I am afraid I have expressed at undue length, I think that Upjohn J. came to a right conclusion in this case and I would dismiss this appeal.

SELLERS L.J. I entirely agree with my Lord. Upjohn J. described the case as a borderline case in respect of the question whether there had been an advancement to the elder son by reason of the father's disposition. It was, indeed, in my view, a borderline case and very little might have been necessary by

way of evidence to permit of that finding. If even the elder son had been 20 years younger it might have been sufficient, but in the circumstances I think any inference to be made on the evidence was too uncertain to justify an affirmative finding that this was an advancement.

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VAISEY J. I agree with everything that has fallen from my Lords and I have nothing of my own to add. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Mark Lemon; H. W. & S. Patey.*

J. A. G.

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[1955 M. 4207.]

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War Damage—Cost of works payment—Preparatory remedial work—Amount payable by War Damage Commission—War damage confined to front wall of house—Rebuilding of flank walls prior to rebuilding of front wall required by district surveyor pursuant to provisions of byelaws and London Building Acts—Whether cost of reinstating flank walls formed part of proper cost of works payable by commission—War Damage Act, 1943 (6 & 7 Geo. 6, c. 21), s. 8.

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A house, which was some 200 years old, forming part of a continuous row of buildings, sustained war damage on two occasions, namely, in September, 1940, and again in July, 1944. In 1948 two dangerous structure notices were served by the London County Council in respect of the property under the London Building Acts (Amendment) Act, 1939, the first relating to the front wall of the property and the other to the chimney breasts in the wall abutting onto a neighbouring house. The front wall of the house was so damaged that it required to be entirely rebuilt.

In order to comply with the requirements of the London Building Acts and the various byelaws thereunder the owners were obliged by the district surveyor to have the party walls rebuilt to a considerable extent before rebuilding the front wall. The War Damage Commission determined that the proper cost of making good the war damage was confined to the cost of rebuilding the front wall, for "in the commission's view it would have been physically

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"possible to rebuild the front wall of the premises . . . without rebuilding the flank walls to the extent to which they have been rebuilt. . . . If the work had been carried out in this way, the physical condition of the property would certainly have been no worse than it was before the war damage occurred. The commission recognize that the age and condition of the flank . . . walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor, but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works":—

Held, that as the commission had found as a fact that it was physically possible to rebuild the front wall and thus leave the premises in at least as good a condition as they were before the war damage occurred, without rebuilding the flank walls, which had suffered no war damage, the cost of conforming with the district surveyor's requirements did not form part of the proper cost of works executed for the making good of the war damage to the property in question.

In re 36, 38, 40 and 42, Jamaica Street, Stepney [1947] Ch. 409; 63 T.L.R. 281; [1947] 1 All E.R. 754 distinguished.

Per curiam. In making good war damage it may be necessary in order to gain access to the damage or to effect properly the reinstatement to demolish or damage and to rebuild or repair or shore up or temporarily strengthen, alter, divest or otherwise interfere with part of the premises undamaged by the enemy. The proper cost of work so necessitated would be part of the cost of the works executed for the making good of the war damage. The essential factor would be in each case that the works executed were necessary for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage. This would be subject to the proviso to section 8 (2) of the War Damage Act, 1943,¹ with regard to unnecessary reinstatement. On the other

¹ War Damage Act, 1943, s. 8:

"(1) Subject to the provisions of this Part of this Act, the amount of a payment of cost of works shall be computed as provided by subsections (2) to (4) of this section.

"(2) If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof: Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from

"the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated.

"In this Part of this Act the expression 'the permissible amount' means, in relation to a payment of cost of works, the amount that is payable by virtue of this subsection or that would have been payable if this subsection had had effect in relation to the payment.

"(3) If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the

hand, if the war damage is made good in a different form from that which existed before, by alteration or addition, whether by the desire of the owner or requirements of building byelaws, the amount of the payment in respect thereof will be no more than "the permissible amount" as defined in section 8 of the Act.

Decision of Vaisey J. [1956] 1 W.L.R. 1477; [1956] 3 All E.R. 556 reversed.

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APPEAL from Vaisey J.

Massey Estates Ltd. ("the owners") were lessee owners of No. 34, Bruton Street, London, W.1, which between 1940 and 1944 suffered war damage. At the dates on which the property sustained war damage it was let by Samuel Estates Ltd. to A.P.B. Nominees Ltd. for a term of 63 years from May 8, 1925, and sublet by the latter company to Warwick Wright Ltd. for a term of 21 years from October 15, 1926. The owners were the successors in title to A.P.B. Nominees Ltd.

The property in question was part of a continuous row of buildings and consisted of a basement, ground floor, and four upper floors. It had a back addition of five storeys and was estimated to be about 200 years old. The front wall of the property was bonded to the flank or party wall abutting on No. 35, Bruton Street, above a point at about the middle of the third storey. Many years before the Second World War tie rods had been installed passing from the front to the rear of the building at the second, third and fourth floor levels and tying in the front wall of the property.

The War Damage Commission ("the commission") was notified in October, 1940, by Warwick Wright Ltd., and in March, 1941, by A.P.B. Nominees Ltd., that the property had sustained war damage. The commission was further notified in August, 1944, by Warwick Wright Ltd., that the property had again sustained war damage.

On April 21, 1948, the London County Council served a dangerous structure notice, under the London Building Acts

"payment shall be an amount equal
"to so much of the proper cost of
"the works executed for the making
"good of the damage as falls within
"the permissible amount.

"(4) The preceding provisions of
"this section shall have effect sub-
"ject to the provisions of the Third
"Schedule to this Act as to deduc-
"tions in respect of the value of

"materials, of failure to take steps to
"minimise war damage, of physical
"changes not directly attributable to
"war damage occurring between the
"occurrence and the making good of
"war damage, and of the cost of
"works which contribute to the
"making good of war damage occur-
"ring on two or more occasions."

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(Amendment) Act, 1939, in respect of the front elevation of the property, in the following terms: "Take down, repair or otherwise secure the brickwork and stucco on the front elevation where fractured loose and defective and do any further work incidental to or rendered necessary in consequence of the foregoing."

On September 4, 1948, the London County Council served a further dangerous structure notice under the said Act in respect of the rear elevation of the property and the chimney breasts on the flank wall abutting on No. 35, Bruton Street. The notice required the taking down and repair of the portions of the property specified in the notice and also required to be done "any further work rendered necessary in consequence of the foregoing."

The property being within the City of Westminster, it was the duty of the district surveyor of that city to see that the applicants duly complied with the terms of the notices. In consequence of their condition on the pulling down of the front wall the district surveyor required that the flank walls, which acted as buttresses to the front wall, be cut back and rebuilt to an average depth of seven feet in respect of the party wall between Nos. 33 and 34, and to a greater extent in respect of the party wall between Nos. 34 and 35. In a statutory declaration dated March, 1954, the district surveyor stated that "the pulling down of the party wall [between Nos. 34 and 35] became part and parcel of the work required to [sic] the front wall."

On December 7, 1950, a claim for a cost of works payment was sent to the commission by the owners' predecessors in title. The parties being unable to agree as to the extent of the war damage, it was eventually agreed that this question should be referred to one of the commission's deputy commissioners for advice, on the footing that such advice should be accepted as final by the parties. A revised specification was prepared on behalf of the owners for this purpose. This specification claimed (inter alia) as war damage the rebuilding from first-floor level of the party wall between the property and 33, Bruton Street, to an average depth of seven feet from the front wall, and the rebuilding from first-floor level of the party wall between the property and 35, Bruton Street, from the front wall to a depth of five feet from the back wall.

The matter was duly referred to one of the commission's deputy commissioners, who inspected the property and reported

to the commission by a letter dated August 12, 1953. The commission formally determined the claims for a cost of works payment by the owners by a letter dated November 25, 1955.

By paragraph 10 of their statement of case the commission stated that "in the commission's view it would have been physically possible to rebuild the front wall of the premises together with a short return at each end, tying in to the original flank walls, without rebuilding the flank walls to the extent to which they have been rebuilt. . . . If the work had been carried out in this way, the physical condition of the property would certainly have been no worse than it was before the war damage occurred. The commission recognize that the age and condition of the flank and back walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor, but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works."

The owners thereupon appealed by way of originating motion for the following relief, pursuant to section 32 of the War Damage Act, 1943, namely, an order that a determination by the War Damage Commission be varied and that the commission had wrongfully excluded from their determination the payment of an amount equal to the proper cost of the works executed to the party walls of the property in question in respect of which a claim was lodged with the commission.

The question of law on which the owners desired to appeal was whether the works aforesaid were works executed for the making good of war damage within the meaning of section 8 of the War Damage Act, 1943.

The grounds of appeal were: (i) that an award dated August 12, 1953, by one of the commission's deputy commissioners, and adopted by the commission for the purpose of their determination, was erroneous in law; (ii) that having regard to the provisions of the London Building Acts and the powers exercised thereunder by the district surveyor for Westminster, the applicants could not lawfully have made good the damage determined by the commission to be war damage without at the same time executing the said works.

Vaisey J. allowed the appeal, holding that the cost of conforming with the district surveyor's requirements formed part of

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1957 said damage to the property in question. The commission
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Michael Rowe Q.C. and Denys Buckley for the commission.
By section 1 of the War Damage Act, 1943, the commission are required to make payments in respect of war damage to land. "War damage" is defined in section 2, and for present purposes it is "damage occurring (whether accidentally or not) as the "direct result of action taken by the enemy." The commission can make two types of payment, a value payment or a payment of cost of works. Here the appropriate payment was a payment of cost of works, and the amount payable is to be measured by reference to the provisions of section 8 (2), "the proper cost of "the works executed for the making good" of the war damage. The condition of the front wall of the building was plainly due to war damage, but the condition of the flank walls was not. True, the district surveyor required that the flank walls be reinstated before the front wall was replaced, but the commission in paragraph 10 of the statement of case has found as a *fact* that the condition of the flank walls was not due to war damage. That finding is binding on the court. Accordingly, the cost of reinstating the flank walls does not form part of the proper cost of making good the war damage to the property.

Vaisey J. construed the words "physically possible" in the first sentence of paragraph 10 of the case as meaning "not "possible as a practical proposition, or in other words . . . "impossible.'" It is submitted that the words "physically "possible" in that context are incapable of bearing that meaning, for it cannot be reconciled with the second sentence of paragraph 10.

By virtue of section 8 (1) and (2), for a payment of cost of works to be valid it must be in respect of works executed for the making good of *war damage*. A payment would not be justified which covered the cost of making good damage not of that character, even although it was executed concurrently with works executed for the making good of war damage, and albeit that any reasonable person would execute such works whilst making good the actual war damage.

Section 8 (3) makes plain what is the maximum amount that a claimant can recover. Whether expenditure be incurred voluntarily or to comply with the provisions of the law, for

example, byelaws, if the claimant expends more than "the permissible amount," he cannot recover the excess even if such portion of the cost were incurred in rebuilding actual war damage, or even if the claimant were required by law to replace by better building work than had previously stood on the site. For example, if a wall damaged by enemy action had been of four-and-a-half inch brick and the local authority's building laws required it to be nine inches thick when rebuilt, the commission's liability would be for the cost of constructing a four-and-a-half inch brick wall and no more. Section 8 (3) plainly indicates the limits of the commission's pecuniary obligations.

Vaisey J. relied on *In re 36, 38, 40 and 42, Jamaica Street, Stepney*,² but that case is distinguishable on its facts. Further, the illustration given in that case at the end of the judgment,³ as possibly affording an exception to the principle laid down in that case, is strongly in favour of the argument put forward by the commission in the present case, for the facts there postulated were more favourable to a prospective claimant than those found in the present case, for here the commission found that it was possible to rebuild the front wall without first rebuilding the flank walls. If Vaisey J.'s view be right, it is difficult to reconcile it with the provisions of section 8 (3); and, further, it would follow that whenever in the course of repairing war damage works were executed at the behest of a district surveyor, then the cost of complying with his directions could be included as part of the proper cost of making good the war damage whether or not that damage was in fact due to "war damage to land." [Reference was also made to sections 6, 7 and 32 of the War Damage Act, 1943, and to *In the matter of Nos. 6 and 8, Halton Terrace, Sevenoaks*.⁴]

R. E. Megarry Q.C. and *D. G. F. Franks* for the owners. The difference in language between the opening words of subsections (2) and (3) of section 8 is to be noted. The two subsections are complementary and are dealing with different states of affairs. Subsection (2) is concerned with putting back a building in the shape it had before the war damage occurred. Subsection (3) is concerned with reinstating with alterations or additions. The present case comes within section 8 (2). But for the war damage the owners would not have touched the flank walls. There is no evidence to show how long the flank walls

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² [1947] Ch. 409.

³ *Ibid.* 419.

⁴ Unreported (1953).

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would have lasted. A payment of cost of works has nothing to do with values. It is reinstatement of the physical entity which is the basis of payment. *In re 36, 38, 40 and 42, Jamaica Street, Stepney*⁵ plainly establishes that it matters not that the owner gets back a better building than existed before the war damage. "New lamps for old" is practically written into the scheme of things.

Vaisey J. was correct in holding that the *Jamaica Street* case⁵ applied to the present case. There is no distinction in principle to be drawn between replacing by a new wall a war damaged front wall and obtaining a new wall for a non-war damaged front wall which would not have had to be touched but for war damage to the property in question. The commission state in paragraph 10 of the case that it was *physically* possible to replace the front wall without rebuilding the flank walls to the extent to which they had been rebuilt; it does *not* state that such rebuilding of the front wall was in compliance with the relevant building bye-laws; looked at solely as a building operation the front wall could have been rebuilt in the manner suggested by the commission. But *legally* it was impossible so to rebuild it, and therefore it was not a practical proposition that it should be rebuilt in that way, since no reasonable person would say that a suggested course of conduct was practical which involved breaking the law.

As to the observations in the *Jamaica Street* case⁶ on which the commission place some reliance, it is submitted that they are purely dicta and that an equally "strong argument" to the contrary can be put forward to that there envisaged. Suppose that in the present case on the pulling down of the front wall it had been discovered that it rested on no proper foundations, and that, therefore, under his powers the district surveyor had required proper foundations to be laid before he would allow the front wall to be rebuilt. It is submitted that in those circumstances the owners would be entitled to the proper cost of putting in the foundations as part of the cost of payment for rebuilding the front wall.

Stress is placed on the words in section 8 (2): "... the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof." These last words show that the whole question is one of motive or purpose. Were the works which were executed done for the *purpose* of making good the war damage or for some other purpose? It is

⁵ [1947] Ch. 409.

⁶ *Ibid.* 419.

not a question of causation. The vital question in the present case is: why did the owners rebuild the flank walls? The answer is: for the purpose of making good the war damage. The definition of "proper cost" is concerned with the financial aspect of the work to be done.

The present case is to be contrasted with the case where owners of war damaged property ask the builders whilst they are on the premises to repair the back wall of the property, which has not suffered war damage and which has no connexion with the war damaged front wall. In that case obviously the repairing of the back wall was not works executed *for the making good of the war damage*.

In the present case if the owners had simply rebuilt the front wall without touching the flank walls, that would not have been "making good" within the meaning of section 8 (2), because it would have involved a breach of the byelaws.

[JENKINS L.J. Suppose the district surveyor had condemned the flank walls before the bombs had fallen on the property, would the legal result have been different?]

No, but there would have been a higher burden of proof on the owners to show that the *purpose* of rebuilding the flank walls was for the making good of the war damage: see the *Jamaica Street* case,⁷ which has some bearing on this question.

The commission have stressed that it was physically possible to rebuild the front wall without any extensive rebuilding of the flank walls; but physical possibility is the wrong yardstick. It is possibility in all its aspects, physical and legal, which has to be considered. [Reference was also made to section 123 (1) of the Act.]

Denys Buckley in reply. The case turns on the meaning of the words in section 8 (2): ". . . proper cost of the works "executed for the making good thereof." It is contended for the owners that these words relate to motive, but it is submitted that the correct test to apply in the circumstances of this case is to ask the question: "are these works which make good the war "damage?" Section 8 postulates the reinstatement of premises in the condition they were in before the war damage occurred. If additional work has to be done by reason of legal necessity or as a matter of practical policy, such work cannot properly be said to be "making good" the war damage.

Cur. adv. vult.

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⁷ [1947] Ch. 409, 418.

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June 3. JENKINS L.J. The judgment about to be delivered by Sellers L.J. is the judgment of the court.

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SELLERS L.J. stated the facts and continued: The Act by section 32 and the rules by R.S.C., Ord. 55c, r. 4, provide that where a party is aggrieved by a determination of the commission, he may appeal on any question of law to the High Court, and in such circumstances the commission shall state a case setting forth the facts on which their determination was based.

The manner in which the case has been stated has not, we think, clearly complied with that requirement, and the failure to do so has, as we see it, caused much of the difficulty and uncertainty which has arisen. The commission should avoid in future confusion such as has arisen here in stating a case for the opinion of the court.

Before dealing with the commission's findings of fact we will refer to the sections of the Act which call for consideration.

Section 1 provides that payments by the commission shall be made in respect of war damage to land occurring during the risk period. Section 2 defines "war damage" as follows: "(a) damage occurring (whether accidentally or not) as the direct result of action taken by the enemy, or action taken in combating the enemy or in repelling an imagined attack by the enemy; . . ."

Of the two kinds of payment specified by section 6 it is agreed that the owners were entitled to receive a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by section 8 of the Act. [His Lordship read the relevant parts of section 8 and continued:]

What, therefore, has to be ascertained in this case is the amount which is equal to the proper cost of the works executed for the making good of the hereditament in the form in which it existed immediately before the occurrence of the damage. "Proper cost" is defined in section 123 and means, shortly, reasonable cost in respect of materials and labour.

All the war damage that had to be made good, so far as this case is concerned, was the front wall of the premises. What were the works executed for making good the front wall? The proper cost of these works became "the permissible amount" payable. If in the course of doing the work of making good there are alterations in the form in which the war damage area existed

before the occurrence of the damage, or if there are additions made to the hereditament then section 8 (3) stipulates that the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount. The owners are not entitled to any greater payment than the proper cost of the works executed for the making good of the war damage. They are, however, entitled to have the benefit, if such it be, of new for old without any apportionment or deduction, unless, it may be, there are exceptional circumstances: *In re 36, 38, 40 and 42, Jamaica Street, Stepney*.¹

Further, we think it must be recognized that in making good war damage it may be necessary in order to gain access to the damage or to effect properly the reinstatement to demolish or damage and to rebuild or repair or shore up or temporarily strengthen, alter, divert or otherwise interfere with part of the premises undamaged by the enemy. The proper cost of work so necessitated would be part of the cost of the works executed for the making good of the war damage. The essential factor would be in each case that the works executed were necessary for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage. This would be subject to the proviso to section 8 (2) with regard to unnecessary reinstatement, that is omissions which would not detract from the value of the hereditament. On the other hand, if the war damage is made good in a different form from that which existed before, by alteration or addition, whether by the desire of the owner or requirements of building byelaws, the amount of the payment in respect thereof will be no more than "the permissible amount." For example, to take Mr. Rowe's illustration, if a wall damaged by enemy action had been of four and a half-inch brick and the local authority's building laws required it to be nine inches thick when rebuilt, the commission's liability would be for the cost of constructing a four-and-a-half inch brick wall and no more.

Paragraph 10 of the case as stated by the commission finds that it would have been physically possible to rebuild the front wall without rebuilding the flank walls to the extent to which they have been rebuilt, and that if the work had been carried out with only a short return (18 inches) on the flank walls the physical condition of the property would have been no worse than it was before the war damage occurred.

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¹ [1947] Ch. 158, 409; 62 T.L.R. 758; [1946] 2 All E.R. 658; 63 T.L.R. 281; [1947] 1 All E.R. 754.

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Vaisey J. put a special interpretation on the words "physically possible" in paragraph 10 of the case, which led him to read the first sentence of the paragraph "as indicating that what is there suggested was physically possible was not possible as a practical proposition, or, in other words, it was in a true sense impossible."² We do not think that meaning can properly be attributed to the words "physically possible" in this context. In particular we do not see how it can be reconciled with the second sentence of paragraph 10, where the commission go on to find that "if the work had been carried out in this way, the physical condition of the property would certainly have been no worse than it was before the war damage occurred." The first two sentences of clause 10 taken together appear to us to amount to a reasonably clear finding that it would have been physically possible to carry out the work described in the first sentence in the sense that it would have been a sound practical rebuilding operation leading to a safe and practical reconstruction judged by ordinary standards in the building trade. Vaisey J. regarded³ the second sentence as "raising the kind of point which was discussed and decided in the *Jamaica Street* case."⁴ With respect, we cannot agree. The *Jamaica Street* case,⁴ as we understand it, decided that, where walls already in a bad condition had suffered war damage so that they had to be rebuilt, the whole of the cost of the rebuilding must be provided by the commission without any allowance for the fact that the new walls were better than the old ones had been before the damage occurred. In the present case the flank walls suffered no war damage, and there can therefore be no ground for throwing upon the commission the cost of rebuilding them to an extent exceeding what was necessary for the purpose of reinstating the war damaged front wall.

Vaisey J. went on to deal with the third sentence of clause 10, which reads: "The commission recognize that the age and condition of the flank and back walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor, but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works."

² [1956] 1 W.L.R. 1477, 1481.

⁴ [1947] Ch. 158, 409.

³ *Ibid.* 1482.

As to the effect of that sentence, the learned judge observed⁵:
 “Now in that sentence the word ‘occasion’ is, in my judgment,
 “equivalent in meaning to ‘justify’ or even to ‘necessitate.’
 “The law, as I understand it, is that as a general rule any
 “preparatory remedial work which has to be done before the war
 “damage can be made good is work for which the proper cost
 “can be claimed as part of the war damage itself.” That may
 be so where there is remedial work which has to be done before
 the war damage can be repaired; but in the present case the
 commission have, as we understand them, found that the remedial
 work on the flank walls required for the purpose of reinstating the
 front wall was of the limited character indicated in the first
 sentence of clause 10 of the case, and that if these limited
 measures had been applied in conjunction with the rebuilding
 of the front wall the physical condition of the property would
 have been no worse than it was before the war damage occurred.

The case, in addition to stating the commission’s final
 conclusions of fact, has annexed to it a statutory declaration
 of Mr. Shiner, who was the district surveyor for the City of
 Westminster at the times material to this case. His evidence
 conflicts in some respects with the facts found in the case; and
 the annexure of the statutory declaration to the case appears to
 have led Vaisey J. to think that he was invited to treat it as
 evidence and so to come to the conclusion, fundamental to his
 decision, that the rebuilding proposed by the commission “was
 “in a true sense impossible,” that is, that the proposed method
 was not in accord with proper building practice. Had that been
 the proper conclusion to reach, we would not differ from his
 decision. It would mean that the front wall could not have been
 reinstated as a matter of practical building without the stability
 or support of the party walls as in fact reinstated, and the whole
 of the work for which payment is claimed would have been work
 executed for making good the war damage to the front wall. But
 in our view the commission did not accept Mr. Shiner’s declara-
 tion. They have found the contrary, that the rebuilding of a
 return flank wall of 18 inches would be adequate. They are the
 tribunal of fact in this case, and plainly their finding of fact on
 this point must be preferred to the view of Mr. Shiner, which the
 commission must be taken to have rejected. Mr. Shiner’s
 evidence is considerably undermined in any case because he
 retained the opinion that the party wall between No. 34 and

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⁵ [1956] 1 W.L.R. 1477, 1482.

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No. 35 had itself been damaged by enemy action, which had been determined otherwise between the parties. The declaration shows, we think, that the district surveyor required the work on the flank walls to be executed to the extent carried out; but, notwithstanding that, as it was unnecessary for the reinstatement of the front wall, it was work outside "the permissible amount" payment.

It is clearly not sufficient for a claimant to show that work was done concurrently with the war damage reinstatement. In order to recover the cost of work undertaken it must be work carried out for the making good of the war damage. The rebuilding of the flank walls beyond the 18 inches accepted by the commission was carried out because of the unsound condition of the flank walls (not war damaged) and because the district surveyor, acting within his powers and applying the relevant byelaws, so stipulated. The war damage was the occasion which brought the unsound party walls to light and which led to their repair, but it was not the cause of it.

Vaisey J. referred to an unreported decision of his in 1953, *In the matter of Nos. 6 and 8, Halton Terrace, Sevenoaks*.⁶ In the present judgment Vaisey J. summarizes the case in this way⁷: "There the premises had suffered some war damage which could be repaired at a cost of £109 7s. Od., but in order to enable such repair to be carried out other repair estimated to cost £306 12s. 6d. had to be effected prior to or concurrently with the carrying out of the first mentioned repair. I held in that case that the £306 12s. 6d. as well as the £109 7s. Od. could be recovered as part of the proper cost although admittedly the larger sum was laid out in putting right what was not directly and in itself war damage at all. I held that the more expensive work was ancillary to or part of the main but less expensive work, and I discussed the signification of the word "impossible." On those findings of fact, which we are not called upon to review, we would regard the case as supporting the views we have expressed above; but we do not find it applicable to the present case.

At the end of this judgment Vaisey J. expressed his conclusion thus⁸: "The conclusion of the respondents as set out in the final sentence of paragraph 10 of their statement of case is, in my judgment, wrong in point of law. I hold that the cost of

⁶ Unreported.

⁸ *Ibid.* 1483.

⁷ [1956] 1 W.L.R. 1477, 1482.

“conforming with the district surveyor’s requirements does form part of the proper cost of works executed for the making good of the war damage to No. 34, Bruton Street, and I will so declare.”

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We cannot agree that the final sentence of paragraph 10 of the case involves any error of law, and it seems to us that the learned judge’s decision to the effect that the cost of conforming with the district surveyor’s requirements did form part of the proper cost of making good the war damage is inconsistent with the facts found by the commission.

Mr. Megarry, for the owners, contended that, although it might have been physically possible to limit the work in the way indicated in paragraph 10 of the case, it would not have been legally possible to do so, because the district surveyor would not allow the work to proceed unless his requirements were carried out. Therefore, says Mr. Megarry, the war damage could not have been made good without carrying out the work required by the surveyor, as he would otherwise have put a stop to all work. Accordingly (so proceeds the argument) the war damage could not be made good without incurring the cost of complying with the surveyor’s requirements, and it follows that such cost formed part of the proper cost of the works executed for making good the war damage.

We cannot accept this argument. If the front wall of a house has suffered war damage which it is physically possible and structurally practicable to make good so as to leave the premises in at least as good a condition as they were in before the war damage occurred, without touching the flank walls, which have suffered no war damage, and if the district surveyor acting within his powers insists on the flank walls being pulled down and rebuilt in conjunction with the reinstatement of the front wall, it may well be that it is legally impossible to reinstate the front wall without also doing the work on the flank walls demanded by the surveyor. But we fail to see how the cost of the work on the flank walls which have suffered no war damage is part of the proper cost of the work executed for the making good of the war damage to the front wall. It is the cost of complying with the surveyor’s requirements and has nothing to do with the war damage. The fact that the surveyor forbids the work of reinstating the war damaged front wall to proceed unless his requirements as to the flank walls are met seems to us to be for this purpose irrelevant.

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Mr. Megarry advanced a further argument to the effect that the question whether any given work was work for making good war damage depended on the intention or motive of the person executing it. This, if we may say so with all respect, seems to us to be plainly wrong.

We would allow the appeal, because the commission, on the facts they found, came, in our opinion, to the correct conclusion in law.

Appeal allowed.

*Leave to appeal to the House
of Lords granted.*

Solicitors: *Treasury Solicitor; Debenham & Co.*

J. A. G.

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